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NOTES OF INDIAN CASES.

Ram Narayan Singh v. **Ram Saran Lal**, I. L. R. 46 Cal. 683 P. C.

In this case the grant of jagir in Raja Ramgarh, Chota Nagpur to a person and his *putra poutradi* was held to convey an estate which would descend only to the lineal male descendants of the grantee and would revert to the donor on their failure. This decision of the Privy Council can only be availed of in cases where by law or custom an estate can be created which will descend to the lineal male heirs of the grantee. In Raj Ramgarh there was such a custom and their Lordships had therefore to decide between the literal meaning of the expression "*putra poutradi*" and the wider meaning of general heritability. Where there is no such custom, the expression, which according to their Lordships is ambiguous, will confer a heritable and an alienable estate not restricted to lineal male heirs, for the reason that such a restricted line of inheritance would be unknown to Hindu Law (See *the Tagore case,* [1] and *Tarkessur Roy* v. *Shoshi Shikuressur Roy* [2]) and because where the language admits of two interpretations that interpretation has to be adopted which would have the effect of rendering the disposition legal and valid (See *Bhoobun Mohini Debia* v. *Hurrish Chunder* [3], and *Akhoy Chunder Bagchi* v. *Kalapahar Haji* [4]. In the language of their Lordships of the Privy Council in *Bhoobun Mohini Debia* v. *Hurrish Chunder* [1] "If the estate which he intended to convey was one which the law prohibits, effect cannot be given to his intention ; but before coming to this conclusion their Lordships must be satisfied that the instrument does not fairly admit of being construed in a sense to which the law will give effect."

Further the decision of the Privy Council can have no application in places where the expression has acquired a technical meaning as denoting an absolute estate unrestricted as to the course of inheritance. Thus we do not think that the effect of this decision is to modify to any appreciable extent the uniform line of cases in which under the expression "*putra poutradi*" absolute estate has been held to pass.

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[1] (1872) I.L.R. Supp. Vol. p. 47.
[2] (1883) L.R. 10 I.A. 51(9 Cal. 952.
[3] (1878) I. L. R. 4 Cal. 23.
[4] (1886) I. L. R. 12 C. 406 (P. C.)

Mani Singh Mandhata *v.* Nawab Bahadur of Murshidabad:— I. L. R. 46 Cal. 691, (P. C.)

There is, in this case, only an application of the plain provisions of the Limitation Act even though such application might have led to a hardship. Their Lordships held that during the management of a disqualified proprietor's estate by the Court of Wards, the possession of the estate continues in the ward, so that any dispossession or adverse possession of any portion of the estate by a third person would put an end to the ward's rights after 12 years, even though the ward is under disability from suing personally to recover the property under S. 51 of the Bengal Court of Wards Act, which provides as follows :—

"In every suit brought by or against any ward he shall be therein described as a ward of Court; and the manager of such ward's property or, if there is no manager, the Collector of the district in which the greater part of such property is situated, or any other Collector, whom the Court of Wards may appoint in that behalf, shall be named as next friend or guardian for the suit, and shall in such suit represent such ward; and no other person shall be ordered to sue or be sued as next friend or be named as guardian for the suit by any Civil Court in which such suit may be pending."

Such disability as is imposed by the Court of Wards Act is not one for which an extended period of limitation is provided for by the Limitation Act. Consequently time was held to have run against the ward from the date of such dispossession and not from the date when the Court of Wards relinquished the management of the estate and the suit was held to be barred by limitation.

The relevant provisions of the Madras Act correspond substantially with those of the Bengal Act and the decision will be the same, if a similar case arises under the Madras Court of Wards Act.

Kummud Behari Lal v. **Hari Charan Sardar**:—I. L. R. 46, Cal. 717.

Though there is some force in the contrary view as indicated in the reference of the judge of the Court of Small Causes, we think the better view is the one which was adopted by the High Court and which affirmed the power of the provincial Court of Small Causes to attach before judgment moveable properties of the judgment debtor. The reasoning of the learned judges may lead to the conclusion that the Provincial Court of Small Causes has also power to effect attachment before judgment of the immoveable properties of the judgment-debtor. The language of the Code of Civil Procedure 1882, 2nd schedule was specific on this point excluding such a power. There is no such express provision in the present Code. But still we think the absence of any provision in the Code to carry into effect in execution of the decree, an attachment before judgment of immoveable property by a Court of Small Causes and the restrictions in S. 7 (*a*), (ii) and O. 50 r. 1 (a) (ii) on the power to execute decrees against immoveable properties are indications from which a denial of the power to attach immoveable property before judgment can be inferred. This view was adopted by the Madras High Court in *Marthamma* v. *Kittu Sheregara* [1], under the Code of 1859 and it has been held to be good law under the Code of 1908 and followed by the same Court in Civil Revision Petition 661 of 1918 reported in the Notes of Recent Cases, pp. 17 and 18 of 36 Madras Law Journal.

Ravanni Achan v. **Thankunni**: I. L. R. 42 Mad. 789.

We wish their Lordships were a little bolder. In *Parwati* v. *Kamaran* [2], it was held that a North Malabar Marumakkatayi is entitled to have the charge of maintaining his wife included in his claim for maintenance. We do not see why the same rule should not apply elsewhere. The practice of women living with their husbands is recognised and it is equally well recognised that when they so live, the tarwad bears the charge of their maintenance. The question as to what charges legitimately come within the term

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[1] (1871) 6 M. H. C. R. 91.

[2] (1882) I. L. R. 6 M. 341.

"maintenance" is one that should be answered like the other question as to the circumstances in which a member is entitled to separate maintenance with due regard to the social practices of the time. There is nothing in the Malabar Law to prevent the courts from taking note of the practice of wives living with their husbands and their maintenance being looked after by the family. The term maintenance has far wider import than feeding charges. It is quite erroneous to suppose that when the right of the junior member to include the charges of maintaining his wife in fixing the amount of maintenance, any claim in the wife to be so provided is recognised. The right is entirely of the husband. In estimating what his legitimate expenses are—the practice of keeping one's wife with him in his house and the expenses to which he is put in consequence are circumstances that must be borne in mind.

Samarapuri Chettiar v. Sudarana Chariar: I. L. R. 42 Mad. 802.

It has always been recognised that contracts for re-sale are an exception to the general rule that in contracts for the sale of immoveable property, time is not of the essence of the contract. In fact, but for this, the whole discussion as to whether a transaction is a sale with an agreement to repurchase or a mortgage by way of conditional sale would have been unnecessary. In *Jamshed* v. *Burjorji*[1] their Lordships of the Privy Council state that as to the circumstances in which the court will regard time to be the essence of the contract, there is no difference between the English and the Indian Law.

Imbichi Beevi Umma v. Raman Nair: I. L. R. 42 Mad. 869.

In *Chakkera Kannan* v. *Kunhi Pokker*[2] Mr. Justice Sadasiva Aiyar expressed the opinion that Putrarvakasam property would enure only for the benefit of the children of the donor. This case accepts and applies the view of the learned Judge. This view, no doubt, is an advance upon the analogies presented by the Hindu Law but we do not see why the possible legal categories are exhausted by those recognised by the Hindu Law.

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[1] (1915) I. L. R. 40 B. 28.

[2] (1918) I. L. R. 39 M. 317 at 335

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THE COURSE OF APPRENTICESHIP. *

Not the least important part in the system of education necessary to make lawyers of our young men and to equip them to practise the profession of law, is the training given in the office and chambers of a practising lawyer. I believe, we are all agreed that to enable the practise of the profession of law some antecedent training is necessary and we are not going to push the democratic theory "Let every man have his chance" to the ridiculous length of entitling any citizen of good morals to practise the profession without any test of legal training or ability whatsoever, as it is to-day permitted in some states of America. Some course of legal education or training is, therefore, a pre-requisite before one can be allowed to take upon oneself the honourable and responsible role of an advocate, to aid in the administration of justice standing as the middleman between the client and the Judge sworn to administer even justice between man and man.

But as to what that education or that training should be, there have been large differences of opinion. Some consider that the study in law schools may well be dispensed with and that the training a student ought to get in the chambers of a practitioner is alone sufficient. They affirm that true legal culture comes only from contact with lawyers and from attendance in courts to witness with the student's own eyes the actual administration of justice ; and protest against the transference of the real control of professional training from the practitioner to the professor. Undoubtedly, a great truth underlies this view ; for, whether the student of law acquires

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the necessary amount of legal culture in the office of the practising lawyer during his apprentice-course as it is now undergone, or not, the junior in the profession, though not technically an apprentice, as we understand that word, acquires by attendance in courts more culture during the first few years of his briefless peroid than he does at any time.

Another school of opinion holds the opposite view that studentship at a law school must be a necessary part of the legal educational system, and considers that the lawyer's office ought not to be the sole avenue or even an alternative principal avenue to legal practice. It is said, that the men entering the profession of law have not merely to practise their profession at the bar, but also to do their part as Judges, as legislators, as legal authors, as legislative draftsmen and as responsible members in running the administrative machinery of government, and that if they are to be fully equipped to be all this, a course of study of the theories of law, general jurisprudence &c., ought also to be gone through by them. This argument gets added weight in our country in view of the great constitutional changes expected to come out of the recent Government of India Act.

But whatever differences in view exist as to the general system of legal education that we need to have, opinion is unanimous that a course of apprenticeship in a lawyer's office is a necessary part of the legal educational system. Our young men must, in their formative years, be brought into the atmosphere of judicial administration and the presence of men who are engaged day by day in the actual work of the practice of the profession, so that they might acquire that grip of life and of office and court routine, which is so essential to the sound study and application of legal principles and an honourable and successful practice of the profession.

I have stated this conclusion in terms for the reason that, in view of the fact that the course of apprenticeship as it now obtains amongst us, is not much too frequently worked with credit to the master or benefit to the student, it is considered by some that the course itself might well be abolished. Possibly, a system of practical legal education which is productive of better and more useful results may be devised ; but that is no reason why, we should, before we secure any such reform in our system of legal education, eschew the existing one. A half loaf is better than no bread. The remedy lies, not in doing away with the system which is faultless by itself, but in readjusting and modifying the manner in which it is worked. Otherwise, we shall, according to our present educational system, be sending out our young men into the profession direct from their school, a state of things fraught with dangerous consequences to the high ideals and traditions which our noble profession of law has always had and maintained with zealous care.

There is another reason why we ought to discourage the view that the course of apprenticeship might be abolished altogether—a selfish reason, perhaps. We have been desirous of securing to ourselves the general control over the practising profession and in particular, the exclusive exercise of disciplinary control over its members, without the matter being brought up before Judges in court. We have the ideal furnished to us by the Inns of Court, and in our own midst we have an analogy in "the Medical Council" which exercises similar control over the registered medical practitioner. Thanks to the learned Judges of our High Court, they have given us a start in the right direction, in consulting our representative Madras Association in all cases of alleged professional misconduct and delinquency and considering its view. Striving then, as we are, for disciplinary control over the profession, it is but a completion of the idea and laying the foundation for it on a broader basis, that we should move to have in our own hands the control over legal education and the power to grant licenses to practise. Is it reasonable then and consistent with the progress that we desire to make, that we should give up even the little part that we now have in the making of a lawyer ?

Again, the growth of democratic ideals,the numerical enlargement of the profession and the consequential increased competition,will not only tend to weaken the corporate and professional tone but also expose our already overcrowded profession to risks of attack from outside. The maintenance of our integrity and solidarity may also be helped, to ever so slight an extent, by the influence we shall be enabled to command by retaining in our hands the control over a part at least of the legal educational course.

Now as to the course itself, apprenticeship in the law is no novel institution. It existed from early times in England, from the 13th century, even before the formation of the Inns of Court. But the apprentice was not a mere student: he was also recognised as a practitioner, a junior of a subordinate grade, without the right of audience before Judges. In our own presidency, the system was inaugurated even by the first set of rules made by the High Court in 1863 under the powers vested in it by clauses 9 and 10 of the Letters Patent for regulating the admission of Vakils to practise in the High Court. The rules provided for attendance for a year in the chambers of a practising lawyer but did not contain any further details. As early as 1891, however, it was felt that through slackness in its working, the course had degenerated into a farce; and with a view to make it a reality, stringent rules, substantially as they now exist, were framed by the High Court as a sufficient safeguard. The service was to be for a year under a Vakil, Advocate or Attorney, of not less than 3 years standing, who had the privilege to take 2 apprentices at a time and a third with the permission of the court. The apprentice was to keep a diary of work from day to day, which the master was expected to control and authenticate periodically with his signature. And before enrolment, both the apprentice and the master were required to file statements that the course was truly and properly undergone. Since 1911, the apprentices have also to attend a prescribed course of lectures on professional ethics and advocacy, which is arranged by the Pleadership Board at the instance of the High Court.

It is unfortunate that notwithstanding the safeguards which were considered quite ample in 1891, there should again be scope for condemnation of the way in which the course is now undergone in practice, so as even to create a doubt as to its utility. The fault, as I have stated, is not in the system and, if anything, there ought to be the cry for an extended course which might do incalculable good It lies largely on ourselves, the master and the apprentice;

and it is rather a difficult task to apportion the blame between them. It cannot be, at any rate, it ought not to be, that we should be subjected to a new set of more stringent regulations, that we should be taught to control our own household by the sanction of rules. We shall then be surrendering what is now our privilege. We trust that we shall realise our responsibilities better and arrest the insidious descent into degeneracy. The misunderstanding of the mutual obligations of the master and apprentice ought to be corrected, and a new era of a well-regulated and useful course of apprenticeship begun. The apprentice cannot expect his master to hold classes for his benefit and to formally sit and explain, what he should learn by his own experience. He ought to learn things for himself availing himself of the opportunities afforded to him. He should be diligent and inquisitive and feel the anxiety to learn, without which no knowedge or learning can be acquired. On the other hand, the practitioners will not be justified in resting on the idea, that nothing lies upon them except to give the apprentice a license to enter their chambers and now and then use him as an amanuensis. Young men fresh from college and with inadequate, if not inaccurate knowledge of the theoretic side of law in some of its branches, ought gently to be made to realise the vastness of the unexplored fields before them and directed, on the right track in a manner to give them the incentive to learn, without making them despondent. They should be warned against the dangers and pitfalls in the exercise of the profession and taught, by the master's own example, to appreciate and maintain the honour and dignity of the profession.

The requirements of the rule that the apprenticeship must be only to a practitioner practising in the High Court is, under existing conditions, a great drawback in the system and needs to be immediately corrected. At the time that the rules were first framed there might have been reasons for thus limiting the privilege of taking apprentices, if really the question was present to the minds of the framers of the rules. The efficiency and competency of the bar other than at the High Court, may not have been realised or recognised. Or, it may have been considered by the learned

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Judges that the training should be entrusted to the bar before them, which must have commanded in their eyes great respect for its efficiency and high moral tone. Or perhaps, the fact that the bar in Madras was then more largely manned by English Barristers of repute (the Vakil bar not having at that time gathered the strength, prestige and influence it now maintains) may have given the bias in favour of the privilege being confined to the Madras Bar. But times have changed and the reasons, if any, for the limitation have ceased to exist. Thanks to the exertions and influence of Sir V. Bhashyam Iyengar and the rest, our status and influence have become greatly enhanced. A high and noble ideal has been set before us, and notwithstanding our increasing numbers we have maintained a high character, learning and ability and won the respect and esteem of the Judges and our fellow-citizens. And the Moffussal bar has equally gained in strength and prestige and influence, and equally maintained the high ideals of our profession. We are all of us Vakils of the High Court, with the same history, with the same ideals, moved or hit by the same forces. We cannot gain or lose except along with our brethren outside the Presidency Town. It is, therefore, reasonable to ask that, while the Vakil Bar at Madras is accorded the duty and enjoys the privilege of training apprentices at law, the Vakil Bar in the moffussal ought to be subjected to a similar duty and enjoy a similar privilege.

Nor does the reason for widening the scope of the rule stop here, merely in a claim of equality of rights. The change has become imperative by reason of existing conditions and circumstances. It is a patent fact that the number of students who take the degree of Bachelor of laws is increasing year after year and necessarily the number of such young men who seek the course of apprenticeship is ever on the increase. Further, the new rule of the High Court making the passing of the "apprentices' examination" compulsory both for eligibility to be enrolled as a Vakil of the High Court and to be appointed to the office of the District Munsif, gives an added impetus to the influx of these young men. The consequence is that more students come up for training than there are practitioners of approved standing, in whose hands it is desirable

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that the training should be. A large body of the students have necessarily to get themselves apprenticed to our younger Vakils who, perhaps, just satisfy the literal terms of the rule declaring the minimum of competency for entertaining apprentices, and these junior Vakils, mostly with great reluctance, submit to an apprentice or two being thrust upon them, moved solely by the genuine motive to help the apprentices to a year's compulsory course which is otherwise denied to them. This congestion must be relieved and it cannot be done better than by allowing our moffussil friends practising in the District and Subordinate Courts to take apprentices and making them share the responsibility of training our young men.

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There is yet another reason in favour of the same view, and that has reference to the nature of the training that our students need. In Madras they attach themselves to a lawyer having practise largely either on the original side or the appellate side of the High Court. For some reason or other that we need not go into, no single practitioner now ordinarily combines a regular practice on both the appellate and original sides of the High Court and necessarily the nature of the training that an apprentice gets varies with the nature of the work of the practitioner to whom he attaches himself. Practically the whole atmosphere in which he lives is different in the two cases, the greater contact with clients and witnesses and the living study of human nature on the one side and the larger company of books and printed papers and the choking legal atmosphere on the other. To the student that determines even at the start to settle in Madras and take largely to appellate side practice, the training that he gets under an appellate side lawyer is indeed of immense value. But in the nature of things it does not sufficiently equip him for taking up the responsibility of conducting original trials which is not identical with that involved in arguing appeals. Oftentimes, we find that in answering the various questions under rule 8 of the rules for the enrolment of Vakils, the appellate side apprentices, if I may so call them, are unable to furnish any answer to the questions which require them to state the number of plaints and written statements prepared by them. Again, the practice and procedure observed on the original side of the High Court vary from those obtaining in the moffussal courts. Therefore, if apprentices should be permitted to undergo the course at moffussal centres also, they could well make the choice so as to best fit them for the future career which they determine upon for themselves.

Further, from the student's point of view also, there is greater facility for training under moffussal Vakils. With his printed papers paged and lined and the innumerable array of digests and indexes, the practitioner on the appellate side of the High Court needs little help from the raw apprentice and even occasionally feels his intervention as a hindrance in his own line of work. The apprentice too cannot naturally be of any great help to the practitioner at the stage at which the cause is in the latter's hands. But to the lawyer in the moffussal courts heckled on all sides by clients and witnesses and worried with long lists of petitions, execution applications and the like any assistance from a younger man ought to be welcomed, and it may well be expected to be of some value too, having regard to the earlier stages of the cause there. Thus, there ought certainly to be greater opportunities in the moffussal to the apprentice to learn his work.

Last but not least, in these days of economic stress and strife the student will have the advantage of pursuing his studies nearer his home and without much cost.

Thus the case for extending the scope of the rule is, I believe, clearly made out and in urging this plea for it, I would ask it to be extended only in favour of Vakils of the High Court practising in the District and subordinate courts, for the main reason that the student will have an equal opportunity to learn both the trial and the appellate work. I would also suggest that in thus widening the scope of the rule the minimum period of practise entitling a practitioner to entertain apprentices may be raised from 3 to 5 years, alike for the Madras and the moffussal practitioners, and other practitioners of all grades permitted by the rule to take apprentices.

As for the lectures on professional ethics and advocacy, there can be no two opinions on the necessity for them. The lectures may well be arranged for a specified part of the year and, as far as possible, continuously given, the moffussal apprentices being required to come up to Madras to attend them.

Thus far, I have dealt only with the course of apprenticeship as undergone by graduates in law preparatory to enrolment as Vakils of the High Court. There is yet another side of the course, namely, that which our masters of law have to undergo to enable them to be enrolled as Advocates. According to extant rules, the candidate is required to study in the chambers of an Advocate of the High Court for 18 months, provided, however that where he has already served a year's course of apprenticeship with a view to admission as a Vakil, he need study in the chambers of the Advocate only for 12 months. With great respect to those responsible for these rules, they seem to be based on no considered or intelligible ground, but made almost mechanically, as if the practical course should vary in direct proportion to the longer and higher legal training the candidate has had.

To begin with, one fails to see how a longer course for an extra six months better equips an Advocate, than a year's course does, a Vakil. The period of 18 months was apparently taken from the earliest set of rules framed on 1st October 1863, which enabled *a Bachelor of Laws* to enrol himself as an *Advocate* after 18 months study with an Advocate. But the true object of the course, namely, to enable the candidate to acquire, a decent and working knowledge of the practice and procedure in courts and a familiarity in the profession, may well be expected to be gained by the master of laws with his greater legal and intellectual training, at least as speedily as the bachelor of laws with his comparatively less adequate preparatory study. Persons called to the bar in England or Ireland are required to produce a certificate of attendance in the Chambers of a practising lawyer only for 6 months at the most; and they are allowed to practise in the Indian Courts without any test of, or guarantee for, their knowledge of the practice of the Indian Courts. A twelve month's study in chambers ought, therefore, to be quite ample even for the Advocate.

Then, persons who have undergone a year's course with a view to admission as Vakils are required to study an additional period of one year. This again has no reason to support it. If a year's service as an apprentice, gives a student sufficient knowledge of practice and procedure and all about the profession itself so as to qualify him to practise as a Vakil, it is not clear how the same course is not sufficient to enable the same individual to practise as an Advocate. Surely, as between the Vakil and the Advocate, or at any rate, this section of the Advocate bar, their methods of work and study, the realisation of their duties to the court and to the client, and the honourable ideals that they have before them, are the same. It cannot also be that the additional course is required to train the Advocate to breathe the peculiar atmosphere of the Advocate bar ; for, the rule is equally applicable to cases where the candidate had also previously served his term of one year under an Advocate and obviously, the training that a student gets does not vary with his ultimate purpose, to enrol himself as a Vakil, or as an Advocate. The Indian section of the Advocate bar or even the European section has not much of an atmosphere of its own in Madras. Nor is the atmosphere in which the Vakil lives one that would stifle an Advocate. Both alike look to the traditions of the English bar for their guidance. Moreover, the Advocate who is a master of laws, cannot dissociate himself from his sympathy for, and attractions to, the Vakil life and the special Advocate training given to him in the past, has not certainly, as our experience shows, tended to instil different ideas in him. Therefore, the additional course prescribed for one who has previously served a year's course with a view to admission as a Vakil, ought to be abolished.

Before leaving the subject of the apprentice course, I desire to add a suggestion which I trust, will be acceptable to our apprentices. The institution of moots is an excellent training ground for the young men and has been availed of since the commencement of the Inns of Court in England. It helps one to acquire the capacity for speaking out one's thoughts, the power of close and consistent reasoning and the ability to carry on a rapid and lively discussion on legal questions in their various aspects. Such an institution is working in the Law College for the benefit of the law students and there is no reason why our apprentices should after they graduate in law consider themselves above it. Lectures on topics such as "res judicata" "fraudulent alienations" and the like subjects, which may well be studied at home from books, may properly give place to moots. The leaders of our bar and our Judges may also be invited to preside and the young men will thereby be enabled to get into closer contact with them all.

THE APPRENTICES, EXAMINATION.

I cannot justly close this paper without referring to the apprentices' examination, though it is not strictly relevant to the subject I have discoursed upon, as not being a part of the apprentice course itself.

Turning to the history of this examination in our own presidency, we find how in recent years, the purpose of its original inauguration has been wholly forgotten, and instead of being a means to an end as it was at first intended, it has now been declared by the authorities to be an end by itself. The first traces of an examination on similar lines, we find in the rules made by the High Court on 1st October 1863, regarding the admission of Vakils to the High Court. A graduate in law could qualify himself for admission to the High Court Vakil bar, either by serving a year's term of apprenticeship or by attending regularly on sittings in the courts for 2 years and passing an examination in procedure. Thus to the student that underwent the year's course of service as an apprentice, no examination was ordained. By rules framed on the 30th April 1870, the latter mode of qnalifying oneself to the Vakil bar was repealed and with that the examination should have ended, but that another rule required, that, or a similar examination to be continued. That rule was one that enabled *Barristers* to enrol themselves as *Vakils* of the High Court, provided they passed *an examination* conducted by the High Court *on the practise and procedure of the Indian Courts.* The object then of the examination, as it was first instituted, is obvious; it was to give a fair knowledge of practice and procedure to one who sought to commence active practice of the profession without any antecedent study in the chambers of a lawyer. The Barrister had no other means prescribed for him, of acquiring that knowledge, because he had to undergo no course of study in chambers in India.

This privilege given to the Barristers was taken away by rules framed on the 2nd of February 1891 and with that the examination was dead for a time until it was revived from its ashes on the 30th March 1900. What was prescribed as an alternative to and a substitute for the study in chambers was now prescribed as a necessary addition to it; the ostensible reason being that the subject of civil and criminal procedure upon which the students were being examined by the University were removed from the course of studies for the law examinations. It was ignored that other equally important branches of legal study never formed sujects for law examinations. This continued till 1911 when the consummation was reached, the learned Judges coming to the conclusion that the passing of the apprentices' examination was an absolute condition precedent not merely to admission as Vakils, but also to appointments as Munsifs.

That in arriving at this result they wholly laid aside any consideration of the pupose of the examination is evident. Prior to 1911, a B. L., who had practised as a pleader for five years in the Moffussal was entitled to be enrolled as a Vakil,or be appointed as a Munsif, without passing any further examination on practice and procedure. Does the High Court mean by prescribing the passing of the examination for him also that the certificate of the pleadership board is greater proof of his knowledge of practice and procedure than the fact of the five year's practice he has had to his credit? The answer is obvious. The High Court have in 1914 enacted an exception, of improbable if not almost impossible occurrence, to the rule in favour of those who had been Judges of a Civil Court in the presidency for three years. This is indeed a hopeful sign; for even if Judges refuse to recognise that practitioners learn anything from practice in courts, or apprentices from study in the masters, chambers, they recognise that Judges at least learn on the Bench.

It is thus unfortunate that by a series of changes in the rules, the apprentices' examination, the necessity for which had been legitimately sustained till 1891, has now been made to outlive its purpose and its sphere of usefulness. Schemes have been evolved without much thought bestowed upon their purpose and their end, and it now lies upon us to expose the fallacy underlying them. The only reason for not having done this earlier, can be the proverbial conservatism and respect for precedent of the lawyer and the meek submissiveness of the Indian student to examinations and his high capacity to get through them without much difficulty.

Apart from history, there are well grounded reasons why the examination ought to be abolished altogether. It is well-known that examinations in law are very poor tests of the capacity for success in the legal profession or even of legal learning, neither of which follows meritorious success in the examination. By itself the apprentices' examination serves no useful purpose. It is not intended to test the student's general capacity for law or his fitness for the legal profession; and as for his knowledge of practice and procedure of the civil and criminal courts in the presidency on which he is examined, it serves, at best, only as a test of the knowledge of the theory of practice and procedure upon which no examination is called for, for the simple reason that not much of a theory underlies them. Indeed that the examination in procedure instituted in 1863 was not one of that kind is obivious ; for the examinee was the graduate in law, who had, according to the curriculam of studies enjoined by the University in those days, passed an examination on the laws of procedure. That was a substitute for the study in chambers ; and in truth the student learns more by his attendance in chambers than success in the examination can certify to his credit.

Nor does it serve as a test of the efficiency of the apprentice to enter the legal profession and accept briefs on his own responsibility. There are other subjects, such as the Limitation Act, the Registration Act, the Court Fees and the Suits Valuation Acts &c., which are at least as important as those he is examined upon. The student had never before to study them in his school course and a knowledge of them is at least equally essential to the practice of the profession.

Again, there is also no reason why one that has made his choice to practise in the moffussal court should master the dry rules of practice on the original and appellate sides of the High Court and *vice versa.*

Lastly, the examination has an evil effect in that it tends to undermine, in practice, the very purpose of the apprentice course. Students in their natural anxiety to pass the examination which is an impediment to their entrance into life start sitting with their books early in their course and shut themselves out from the beneficent experience and knowledge which they are expected to acquire from the varied natural influences and personal experiences of the living study in chambers. The student should be freed from the shackle and left free to learn the profession with a single aim. The certificate of the master to whom he is apprenticed, as to his fitness and competency to be enrolled as a Vakil of the High Court, ought to be a sufficient guarantee and acceptable to the High Court.

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SUMMARY OF ENGLISH CASES.

Central Control Board (Liquor Traffic) v. Cannon Brewery Co. Ltd. (1919) A. C. 744.

Land Acquisition—Compensation—Right of the subject—Mode of assessment—Determination by Court—Award of executive body—Statute—Interpretation, rules of.

With the object of regulating and controlling the traffic in liquor during the period of the war, the Central Board (Liquor Control) acquired compulsorily the fee simple of certain licensed premises belonging to the Respondent under the Provisions of the Defence of the Realm Act and Regulations. The question arose whether the respondent was entitled, as of right, to recover compensation under the Land Clauses Consolidation Act (1845) or whether he was bound to accept such sum, as might, by an act of grace, be awarded out of public monies on the recommendation of the Royal Commission of Enquiry appointed by the Crown. *Held,* by the House of Lords, that the Respondent was entitled to compensation as of right under the Land Clauses Consolidation Act (1845).

Per Lord Atkinson :—An intention to take away the property of a subject without giving to him the legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms. In the absence of unequivocal language confining the compensation payable to the subject to a sum given *ex gratia*, it cannot be so confined. Where a statute authorising the taking away of, or causing damage to, the subject's property, either does not provide a special tribunal to assess the amount of compensation or only provides a tribunal which has become non-existent, the subject is entitled to have that amount assessed in the High Court of Justice.

Les Affreteurs Reunis Societe Anonyme *v*. Leopold Walford (London) Ltd. (1919) A. C. 801.

Contract—Terms reduced to writing—Custom at variance with—Benefit to third party—Right to enforce contract—Shipping—Charter-party—Construction.

By a clause in a time charter-party it was provided that a commission of three per cent on the estimated gross amount of hire was due to a broker, Leopold Walford, on signing the charter (ship lost or not lost). No hire was as a matter of fact earned under the charter-party. In an action for recovery of brokerage, *held*, that the charterers as trustees for the brokers could enforce the clause for brokerage against the ship-owners; and that a custom of the city of London by which commission was payable only if hire was earned under the charter-party, could not be set up by the ship-owners as an answer to the claim for brokerage inasmuch as it was inconsistent with the express terms of the contract.

Bourne *v*. Keane: (1919) A. C. 815.

Will—Bequest—Superstitious uses—Bequest for masses for soul of testator—Validity of—Statute—Interpretation—Preamble, value of—Stare decisis, limits to the application of.

Held, by the majority of the House of Lords (Lord Wrenbury *dissentiente*) that a bequest of personal estate for masses for the dead is not void as a gift to superstitious uses. Neither the common law nor the provisions of the statutes now in force invalidate such a bequest either directly or by implication.

West v. *Shuttleworth,* (1835) 2 My. & K. 684 overruled.

The preamble is an important part of a statute, and plays a definite part in the construction of the enacting part. But it is not itself the enacting part and cannot have that effect. If any doubt arises from the terms employed by the legislature, it is a safe method of collecting the intention to have recourse to the preamble.

Per *Lord Buckmaster* :—The construction of a statute of doubtful meaning, once laid down and accepted for a long period of time, ought not to be altered unless the court could say positively that it was wrong and productive of inconvenience. Decisions upon which title to property depends, or which by establishing principles of construction or otherwise form the basis of contracts, ought to receive the same protection. Decisions that affect the general conduct of affairs, so that their alteration would mean that taxes had been unlawfully imposed, or exemption unlawfully obtained, payments needlessly made, or the position of the public materially affected, ought in the same way to continue. But these principles do not compel a Court to accept as accurate, a doctrine plaintly outside the statute and outside the common law, when no title and no contract will be shaken, no person can complain, and no general course of dealing be altered by the remedy of a mistake.

The Initiative and Referendum Act *In re.* (1919) A. C. 935. (P. C.)

Constitutional Law—Canada—Provincial legislatures—Powers of—Delegation of functions—Substitution of another legislative body—Office of Lieutenant-Governor—Legislation affecting—Ultra Vires—Colonial Laws Validity Act (1865) S. 2—Applicability of—British North America Act, 1867 (30 *and* 31 *Vic. Ch.* 3.) S. 92.

In the Canadian constitution, though the Lieutenant Governor of a Province is appointed by the Governor-General of Canada, yet as the appointment is made under the Great Seal of Canada, and therefore really by the executive Government of the Dominion which is in the Sovereign, the Leiutenant-Governor is as much the representative of his Majesty for all purposes of Provincial Government as is the Governor-General for all purposes of Dominion Government. The British North America Act, S. 92, which empowers a provincial legislature to amend the constitution of a province excludes the making of a law which abrogates any power which the crown possesses through its representative, the Lieutenant-Governor.

The provincial legislative assembly of Manitoba purported to pass an Act styled the "Initiative and Referendum Act", which had the effect of compelling the Lieutenant-Governor to submit a proposed law to a body of voters wholly distinct from the legislature of which he was the constitutional head, and rendering him powerless to prevent it from becoming an actual law if approved by those voters. *Held,* that the aforesaid provisions were *ultra vires* the legislature and that the offending portion of the Act being so closely interwoven with its scheme as to be inseparable, the Colonial Laws Validity Act (1865) could not be applied so as to validate any part of the Act.

Where a provincial legislature is given by an Act of Parliament full powers of legislation on the subjects entrusted to it, it is competent to that legislature while preserving its own capacity intact, to seek the assistance of subordinate agencies and entrust them with the power of making rules and regulations. But it is not within the competence of the legislature to create and endow with its own capacity a new legislative body not created by the Act to which it owes its own existence.

Board *v.* Board : (1919) A. C. 956 (P. C.)

Legal rights—Infringement of—Remedy—Jurisdiction of High Court—Divorce—Canada—Alberta.

If a legal right exists or is conferred by statute, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of Justice. In order to oust jurisdiction, it is necessary in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court.

Where therefore, the right to divorce had been introduced as part of the substantive law of the province of Alberta in Canada, the jurisdiction to enforce that right would vest in the Supreme Court of Alberta though such jurisdiction was not expressly conferred on it by legislation.

The Kronprinzessin Cecilie: (1919) A. C. 964 (P. C.)

Prize—Condemnation—Appeal, right to—Appellants not owners of cargo—No locus standi.

It is not competent to persons who were not the owners of the goods at the time of their seizure in prize, to prefer an appeal against their condemnation. Nor could they ask for impleading the owners as parties to the proceedings or for an order rectifying an apparent error in the decree appealed from.

The Leonara: (1919) A. C. 974. (P. C.)

International Law—Rights of belligerents and neutrals—Maritime warfare—Retaliation—Infringement of rights of neutrals—Jurisdiction of the Prize Courts.

There are certain rights, which a belligerent enjoys by the law of nations in virtue of belligerency, which may be enforced even against neutral subjects and to the prejudice of their perfect freedom of action, and this because without those rights maritime warfare would be frustrated and the appeal to the arbitrament of arms be made of none effect. Such for example are the rights of visit and search, the right of blockade and the right of preventing traffic in contraband of war. In these cases the belligerent sovereign does not create a new offence *motu proprio*; he does not, so to speak, legislate or create a new rule of law; he elects to exercise his legal rights and puts them into execution in accordance with the prescriptions of the existing law. Nor again in such cases does the retaliating belligerent invest a Court of Prize with a new jurisdiction or make the Court his mandatory to punish a new offence. The office of the Prize Court is to provide a formal and regular sanction for the law of nations applicable to maritime warfare, both between belligerent and belligerent and between belligerent and nautral.

Retaliation is a branch of the rights which the law of nations recognises as belonging to belligerent. When once it is established that the conduct of the enemy gave occasion for the exercise of the right of retaliation, the question whether the mode in which it has been exercised is such as to be invalid by reason of the burden which it imposed on neutrals, is a question of fact and of degree.

Disregard of a valid measure of retaliation is, as against neutrals, just as justiciable in a Court of Prize as is breach of blockade or the carriage of contraband of war.

The Hamborn : (1919) A. C. 993 (P. C.)

Prize Ship—Company incorporated in neutral country— Neutral flag—Enemy control—Condemnation.

The Admiralty captured a ship owned by a Company incorporated in a neutral country whose flag the ship flew and was entitled to fly. It was found on the evidence that the company was entirely under the direction and control of Germans resident in Germany. The President condemned the ship on the ground that she was enemy property. *Held*, that the ship had been properly condemned as a prize having regard to the Order in Council of October 20, 1915. *Daimler and Co.* v. *Continental Tyre and Rubber Co.* (1916) 2 A. C. 307 applied.

JOTTINGS AND CUTTINGS.

The following is the Presidential Address of the Honourable Mr. S. Srinivasa Aiyangar, B. A., B. L., C. I. E., Advocate-General, Madras, as Chairman of the First Madras Lawyer's Conference held on 24th and 25th January.

I am profoundly grateful to you for the signal honour you have just done me in electing me to preside over your deliberations. Frankly I consider it the proudest moment of my life though your choice is perhaps due less to my personal qualifiications than to the office that I happen to hold and to the part that I have taken in organising this Conference. The memory of this day ought to purify and strengthen me for such work as it may fall to me to do for the profession. The heart-felt thanks of the signatories to the Manifesto and of those friends in Madras who have helped them to organise this Conference as well as mine are due to you for your responding to our invitation and for your evident desire to make the Conference a success. I also owe you a word of apology. In convening this Conference, mistakes have been made, invitations have not been sent to all those to whom they should have been sent and the committees of arrangements were constituted more or less informally. But as far as possible opinions were invited from Madras and from moffussil members and help of the most valuable character in the shape of carefully prepared papers and useful suggestions and resolutions has been received from various associations and individuals. I am sure the lawyers of the province will realise the great difficulties of organising the initial session of a Conference or Convention of this description. Those who have been responsible for the arrangements in Madras as well as those outside have notwithstanding great pressure of professional and public work been able to give the time and attention needed for the purpose. I must express my deep debt of thanks to those who have so generously helped to organise this Conference and I must on behalf of myself and fellow-workers crave the forgiveness of delegates for any inconvenience or inattention to them.

The necessity for such a Conference as this is fairly obvious. For a good many years past there has been a feeling that while lawyers as members of the public have been taking strenuous part in innumerable conferences of one kind or another they have not sufficiently interested themselves in their own affairs and have not tried to set their house in order. Professional associations in Madras like the Vakils' Association and the Bar Association and the associations in the moffussil have no doubt been doing a good deal of useful work. But they are either sectional or scattered. The want of a common organisation for the entire legal profession of this Presidency has prevented or retarded our improvement in many directions. Especially has the need for a common assembly of the moffussil and the Madras lawyers been widely felt. The Vakils' Association in Madras has to its credit a long record of splendid work; and the Vakils in Madras at their gathering in last December were able to take a step forward and have adopted certain rules relating to juniors and change of Vakils. But it cannot in the nature of things serve the purposes of a wider organisation formed for the purpose of reorganising and unifying all sections of the profession as this Conference is. I hoped when the idea of this Conference was first entertained that the Barristers would join us in a body but it is quite natural that they should feel that they would be swamped by numbers unless they had adequate safeguards.

They have however in answer to our invitation come to attend the Conference not as delegates but as visitors to talk over matters with us in a friendly spirit and with a view to join us. I am sure you will all welcome their co-operation and be prepared to make those concessions which may be necessary to safeguard the rights of a minority. I am equally sure that the Barristers realise the desirability of co-operating with you and I therefore trust that the next year's Conference, if you decide to have one, will be even more fully representative of the legal profession of the Presidency than this year's is. Meantime it is a satisfaction that this Conference has achieved one of its principal purposes namely to bring the Madras and the moffussil lawyer together. In the second place an annual meeting of the lawyers for business purposes focusses the efforts of associations and of individuals in connection with various matters touching the profession. I hope this Conference will give the profession a direction and an aim it has hitherto lacked, and will enable it to advance with sure and steady steps. Co-operation and co-ordination of activities are as vital in our department of life as in others. And the freshness and enthusiasm which a large annual assembly like this can alone give us will certainly be most helpful to every member of the profession throughout the year. It will provide the needed quickening and will in future prevent that stagnation which has been visible amongst us for some years past. Thirdly it cannot be gainsaid that inadequate attention has so far been paid to law reform especially to Hindu Law reform. It would be difficult for laymen to educate the public either as to the general necessity for legal reforms or as to the propriety of any proposed remedy. Not only in the matter of Hindu Law reform but in other matters the lead of the legal profession, if it is clear and disinterested as I know it has always been and as I hope it will always be, will be decisive in inspiring and shaping legislation, under the new Reform Act. In fact, the education has to begin at an earlier stage, for our countrymen have to realise the serious defects in the present state of the law and litigious procedure. This work cannot successfully be carried out unless there is a general consensus of opinion in the legal profession. In fact half the litigation for which lawyers are blamed will be avoided and its expense minimised if legal reform is undertaken and law is as far as possible codified, if enactments are expressed accurately and the authority of case-law is circumscribed to its narrowest limits. Fourthly, there are several topics of professional interest which require to be periodically discussed by a large representative assembly drawn from all sections of the profession and from all parts of the Presidency. I would refer to Professional Ethics and Etiquette, the Rules of practice of the Courts, the position of Juniors, the training of Apprentices, Legal Education, Law Reporting, prevention and reduction of unnecessary litigation, protection of the interests of the litigant public, Co-operative society for lawyers, provision for legal assistance to poor persons, the recruitment from the Bar to all grades of judicial services, particularly the highest and above all the effacement of any sectarian feeling in the profession and the re-organisation and unification of the Bar. Lastly, the formation of a Standing General Committee at once authoritative and representative of the entire body of the legal profession in this Presidency can only be achieved by a Conference like this. I need hardly say that lawyers conferences are held in America, Canada and other countries for purposes similar to ours. In England also it appears there was no organisation of the whole body of the English Bar till 1883 when a body called the Bar Committee was constituted to "collect and express the opinion of the members of the Bar on matters affecting the profession and to take such action thereon as may be expedient." That committee was composed of persons elected by the whole bar. It was replaced in 1894 by the General Council of the Bar a consultative and advisory body constituted by regulations approved by the Bar in general meetings. The General Council has been declared to be "the accredited representative of the

Bar and its duty is to deal with all matters affecting the profession and to take such action thereon as may be deemed expedient."

This Conference will have to decide as to its future constitution and to frame rules for the purpose. The draft rules that have bean circulated are purely tentative and are intended merely as a basis for discussion. At the same time I think it will be an advantage to start with a simple and elastic set of rules and to postpone the consideration of elaborate provisions to future sessions. The object of this Conference is to unite and strengthen all sections of the profession and to protect and promote their common interests. I am sure its deliberations will be conducted in no narrow spirit. Far from weakening the existing professional organisations the purpose of this Conference will be to strengthen and co-ordinate them. Co-operation and clear vision should be our watch words. I should like to say a word or two as to the subject-matter of the resolutions to be passed by you and the procedure to be adopted. The notice convening this Conference laid stress that this should be a BUSINESS CONFERENCE. For some years to come the Conference should ordinarily allow only such resolutions to be brought up before it as will admit of practical unanimity or are likely to be passed by an overwhelming majority. On matters on which there is no such unanimity papers may be read or debates may be allowed without voting so as to enable us to educate one another. Again, subjects and conclusions of a political complexion as well as those which will be admissible only on a social reform platform should be equally put aside in a professional Conference, apart from the fact that some of the members of the Bar as well as myself enjoy the privilege or if you will, labour under the disability of having no politics. I need hardly remind you that the intrusion of a political or a social reform motif is likely to weaken our professional unity. Those subjects are best dealt with separately and are amply taken care of on other platforms by other organisations. We will do well to concentrate our attention on professional matters and aspects.

Our first and most imperative need is our own re-organisation. That need has been widely felt and repeatedly expressed. The present state of the legal profession in this province is anomalous in the extreme. It can only be accounted for on historical and not on rational grounds. Our profession consists of six divisions, *viz.*, the Barrister-Advocate, the non-barrister-advocate, the Vakil of the High Court, the Attorney, the First Grade Pleader and the Second Grade Pleader. There is no distinction between an Advocate and a Vakil either on the Appellate Side of the High Court or in the moffussil Courts except that a Vakil requires a Vakalat and an Advocate does not. The Attorney is interposed between the Advocate and the client only on the Original Side of the High Court and in Original Side appeals. Again between the Vakil and the Attorney there is little difference in theory except in connection with the original side business. That business is, in this Presidency at least, small compared to the volume of the business in the appellate side, and in the moffussil Courts.

The maintenance of these sectarian distinctions only impairs the efficiency and solidarity of the profession. Everyone will readily admit that the Vakil Bar in this province as in others has built for itself a great position and has distinguished itself in several departments of life. I can only repeat what I have always said that I yield to none in my admiration for the work, legal and public, that the Vakil branch of the profession has done and the conspicuous impress it has left upon the national life. Its possibilities however are likely to be soon exhausted unless a fresh impetus is imparted and fresh principles are introduced. The legal profession should occupy an even more useful and honourable position than in the past. And the work that lies before us will be far more onerous and will require far closer cohesion amongst us. It is not easy, however, to propose measures for improvement that will be readily welcomed by all. A good deal of patient thinking and of give-and-take is necessary before a scheme can be elaborated which while satisfying all sections of the Bar and while securing it increased efficiency and an enlarged capacity for usefulness will provide for the formation of a strong, homogeneous and independent

Bar. In what I say on the subject I desire not to be misunderstood by any section of the legal profession. My views are necessarily personal and I merely offer them for your criticism and consideration. The questions, however, are of such pressing importance that I would earnestly appeal to you to begin to consider them seriously at this Conference. It appears to me that in the future there ought to be a single and uniform system of recruitment to the Bar after making such due provision for its existing members as will enable them to get absorbed in the new system without any serious injury to their vested interests. All legal practitioners in the moffussil courts should also feel that they belong to an honourable profession and are equal in point of status with those that are entitled to practise in the High Court. The moffussil courts ought to have the assistance of the same grade of practitioners as the High Court has. It is not desirable either from the point of view of reduction of litigation or of any other that the trial court and the appeal court should be assisted by different grades of practitioners. I am not in favour of the hier-archical system which now obtains. Again the distinctions between the Barrister and the Vakil are wholly unreal. They serve only as a fertile source of misunderstanding and should be swept away. The legislature has already abolished almost all the distinctions. Almost all the legal and judicial offices can be held by a Vakil as well as by a Barrister. A Vakil has now been made eligible to be a Chief Justice of a High Court or the Law Member of the Viceroy's Executive Council. Fortunately owing to a variety of causes which it is unnecessary to mention the relations between the Barrister aud the Vakil are to-day far more cordial than they were about 20 years ago. Secondly the necessity is increasingly felt for a qualified form of double agency, some division of labour, some specialization. In a very considerable number of cases at least two practitioners are engaged. And last December the Madras Vakils' Association adopted a rule requiring two practitioners to be engaged in cases above a certain pecuniary value. Thirdly a greater freedom from the pressure of the client and his agent than is now possible will, I feel sure, be welcome to many members of the profession. There are other reasons of minor importance tending in the same direction. On the other hand one is not certain that the English system of double professional agency is suited to our conditions and will not be more expensive. We cannot predict what its results would be if it were uniformly adopted. In America, Canada, and in some other countries of the world that system does not obtain. The opinions of most of us on the matter have been fluctuating and divergent views are held amongst us. It appears to me that the lines of re-organisation should be in the direction of effacing distinctions rather than of creating new ones. Vakils ought to be enrolled as Advocates in the Madras High Court just as they are enrolled as Advocates in the Mysore Chief Court or as after some standing they are enrolled as Advocates in the Bombay, Allahabad and Patna High Courts. I do not think that Barristers will prefer to be enrolled as Vakils of the High Court as they were in the days of the Sudder Court. While it should be open to an Advocate both to act and to plead, circumstances will compel or the rules of the profession should require one section of them to specialize as Senior Counsel, another as Junior Counsel and a third as Solicitors, but with no impassable barriers between. There should be no technical differentiation. Another proposal that I once advocated is while maintaining the distinctions between the Barrister and the Vakil that the court should make a rule enabling any Vakil or at least a Vakil of a particular standing to enrol himself as an Advocate. The whole question of re-organisation bristles with difficulties not the least of which is the provision for vested interests. A courageous solution of that particular difficulty will bring the question within the range of practical politics. Even if you are unable to come to a conclusion at this Conference I trust it may be desirable at least to appoint a Committee to investigate the feasibility of one or other of the alternative schemes which are in the air and to recommend a conclusion that would be satisfactory to all sections of us.

The next subject that ought to engage our attention is that of Professional Ethics and Etiquette. The general ideals of the profession are plain enough. A member of the legal profession should always behave as a gentleman and should be just and honourable in his dealings and should have a high conception of his rights and duties and should be courageous in the exercise of his functions and scrupulous in the discharge of his duties. Though the cynic may call them shining commonplaces these wholesome ideals are necessary and in most cases sufficient. But they do not always enable us to solve all the difficulties that confront us in the practice of the profession. Technical and conventional rules of conduct are occasionally required. I do not think a written code regulating the etiquette and practice of the Bar is required in India any more than it is in England. Last year there was a discussion in the Canadian Bar on the subject. On behalf of that Bar Mr. Justice Riddell of the Supreme Court of Ontario invited the Chiefs of the Bench and the Bar in England, Scotland, and Ireland to give their opinions as to the advisability of framing a code of legal ethics. Without a single exception all of them were opposed to a written code of professional ethics particularly the Lord Chancellor and the Lord Chief Justice of England, the Attorney General and the Chairman of the General Council of the Bar. Mr. Justice Riddell himself advised the Canadian Bar that a Code of Legal Ethics if general is unnecessary, if specific dangerous. Nevertheless it is interesting to find that the general sense of the profession in Canada is said to be in favour of a Code. According to the English practice the General Council of the Bar from time to time deals with cases submitted to it for decision or advice with reference to practice and etiquette and the answers to these questions are published in the annual statement issued by the Council. Certain rules as to retainers have also been agreed to. Beyond these the whole question of professional conduct is left to be governed by a floating body of practice and tradition. I do not know what your opinion may be but I am certainly in favour of the view that there should be no code of Legal Ethics. Much of the literature on the subject of professional Ethics was admirably resumed by the late Mr. Justice Sundara Iyer in his lectures on Professional Ethics. While everyone will readily agree with much of what was said by him his views cannot as to all matters be accepted as a substitute for rules of professional Ethics and Etiquette. The value of his opinions would certainly have been greater if they had been expressed by him while he was a practising member of the Profession. For instance, on the question whether the promise of the practitioner to render professional service and the promise of the client to remunerate him are dependent or independent, I must differ from Mr. Justice Sundara Iyer's view and express my entire agreement with Sir P. S. Sivaswami Iyer whose ideals were as high as those of any member of the Bar and who was also Advocate-General for some years. He says in his foreword to Mr. Justice Sundara Iyer's book that "the rule which accords best with common sense, convenience and practice is that the contract for service is dependent on the performance of the contract for remuneration". There are one or two other views of Mr. Justice Sundara Iyer's which are equally open to question. Judges may not always realise the difficulties of the Bar or the necessity for the proper exercise of its rights and privileges. Therefore the conduct of a member of the profession must be judged by the rules and standard of his profession. A member of the profession should not do anything which would be reasonably regarded as disgraceful or dishonourable by practitioners of good repute and competency. That view is well settled in England and has been uniformly recognised by the courts. The consequence of this view that the duty devolves upon us to declare and maintain the high ideals of the profession is to make the ideals and practice higher and purer. The higher our deals are the better for us, for our clients, for the administration of justice and for our country. While it is not necessary that our ideals should be too austere or impossible, our profession cannot be run merely as a glorified trade or business. Let me not be misunderstood. All that I mean to suggest is while there will be a tendency on the part of most of us to idealise our profession there will be a tendency on the part of a few to pull it down. Therefore, while it is not necessary to frame a Code of Professional Ethics it is advisable from time to time to make a few rules and to see how they will work. An excellent beginning has quite recently been made by the Madras Vakils' Association. One of the rules adopted by it is to the effect that a Vakil of over ten years' standing is ordinarily expected to refuse to appear unless there is a Junior in the case. Another rule provides for the minimum fee for the Junior. A third rule relates to transfer of briefs : a fourth rule prevents the Vakil from suggesting to the client the engagement of another practitioner when a Junior has already been engaged. Yet another important rule is "No Vakil shall accept an engagement from a client who has already engaged a Vakil in the case unless the consent of the latter in writing is obtained". There is little doubt that these rules will be loyally followed as far as possible by members of the Madras Vakils' Association. I trust this conference will apply these rules to the moffussil also with such modifications as may be desired.

The Legal Profession has always been subjected to the severest criticism. I think it is the fierce light of criticism that beats upon it which makes it so just and efficient so high in ideals and honourable in practice. There is a considerable amount of feeling in the country that the Lawyer enjoys a far greater position than he is entitled to for the service he renders to the community. Every member of the profession is supposed to be shaking the Pagoda tree every day in the year and his trained advocacy is either distrusted or feared. I maintain that the legal profession is an expert profession The income of the average lawyer is not greater than the income of an average member of any of the more lucrative professions and services and is certainly far less than that of a skilled broker or merchant. The time has perhaps come when we should as far as possible devise measures for the reduction of litigation and of wasteful expenditure thereon. Frequent and careful legislation is the only real remedy for the evil. A systematic codification of law and a system of revision responsive to changing circumstances is the most urgent need of the litigant public. We should also have a system of Law Reporting framed on drastic lines. I am not sure that in our country the Roman system or the Hindu system of jurists expressing opinions would not be better than the English system of case-law. To disentangle a rule from a complicated set of facts and from a lengthy judgment which rightly proceeds upon all the circumstances of a particular case with reference to the arguments that were addressed is not, I venture to think the ideal mode of ascertaining law. The Judges should be required to state a rule of law in an abstract manner and it is the rule of law alone that should be reported. The fiction that Judges do not make law but only apply it to existing facts may be convenient. But if Judges find difficulty in stating a rule with necessary qualifications and limitations how much more difficult it is for members of the profession to know what the law is, and how impossible it is for a citizen to understand it. Judge-made law should be stated in the form of propositions or in other formal manner. Neither the facts nor decisions on them nor the passages in which a rule of law was applied to particular facts should be reported. My view is that where there is no enactment of the Legislature, courts should have the power of judicial legislation. If precedent is required Indian Courts have it in the opinions of Full Benches which are delivered in answer to abstract questions. The illustrations to Indian enactments have been of considerable use and the opinions of Judges should, I submit, take that line.

The next question concerns our duty to the State and to the public as regards legislation and the reform of the laws of the country. I do not suppose that in the Legislative Councils there will be many lawyers. And a lawyer who is a member of a Legislative Council has necessarily to busy himself with the administrative or political side of the question rather than its legal or technical side. In the course of our daily practice many a suggestion occurs to us as we construe an enactment or study a case but we do not make a note of it. We must learn to cultivate the habit and send our suggestions to our committee. It is only a special committee of our profession that can adequately discharge the task of suggesting appropriate amendments to existing Acts or of proposing new legislation. But we must confine ourselves to topics which are neither political nor otherwise highly controversial.

When a Bill is published in the Gazette or sent to any of our Associations for remarks we must promptly and carefully examine its provisions and its technique. It may even be necessary to employ paid agency for the purpose. For we must not forget that the legal profession has a vital interest in seeing that the laws that are made by the legislature are made as perfect as possible. That is a supreme duty they owe to the State and the public. Turning to reforms in the field of Hindu Law there is great truth in the charge that Mr. Justice Seshagiri Aiyar laid against us the other day that we are sadly neglecting them. This Presidency and all lovers of Hindu law througout India are deeply indebted to him for his Hindu Transfers and Bequests Act. The times are ripe for large reforms. It can no longer be said that any reasonable amendment of Hindu Law will be opposed by the people. Nor can it be said that the present state of that law is perfect. Take for instance the law of survivorship. Recent decisions of the Privy Council have, notwithstanding misconceptions of the Courts in India, restored the old Hindu Law doctrine that a unilateral declaration by a co-parcener of his intention to become divided is sufficient to effect a severance. They so often but do not altogether remove the numerous difficulties due to survivorship. It permeates the whole structure of social and family life in this Presidency. It is in anomaly that a co-parcener's share of the joint family property should not in the absence of male issue go to his wife, daughter, or daughter's son but should pass by survivorship to his brother, nephew, cousin or other remote kinsman. The law of survivorship is against the ties of blood and natural affection and is a survival of an archaic system. My own view of the real Mitakshara Law is that a co-parcener could give or bequeath his undivided share though not the undivided family property. Whether that is correct or not, it follows or ought to follow from the recent decisions. From that it is only a further step to make the widow, daughter or daughter's son inherit the undivided share of a co-parcener. I do not wish to labour the point but may I remind you that nothing but the habit of thinking in terms of existing institutions is responsible for a very real hardship. I maintain that interference with the law of survivorship is not interference with Hindu religion or with the distinctive ethics of the Hindu society, for orthodox Hinduism exists in the Dayabhaga system as much as here. I am merely appealing to you to recognise the superior rights of the wife, daughter and daughter's son. Again, the law as to Hindu widows and reversioners requires serious amendment. I can quite understand that the widow and the daughter should have a life-estate where it is necessary to pass the property intact to the daughter's son. But in the absence of the daughter's son, it is a cruel anomaly that the Hindu widow and daughter should have a limited estate so as to benefit a distant sapinda or samanodaka of the fourteenth degree. In my view the widow should have a life-estate where there is a daughter and the daughter should have a life estate where there is a daughter's son. In the absence of the daughter or the daughter's son as the case may be, each should have an absolute estate. Thirdly, a widow in this province should as in Bombay be allowed to make an adoption even without the husband's authority of the sapinda's consent and the limit of time within which adoptions can be made should be defined by the Legislature. Fourthly, modifications in the chaptes of succession should be made so as to bring in the son's daughter, the son's daughter's son, and the daughter's daughter immediately after the daughter's son and the sister's son, the sister and the brother's daughter and the sister's daughter immediately after sapindas of three degrees. Fifthly, illegitimate sons of Sudras should be disqualified from inheriting to the estate of their putative father. Sixthly the position of junior members of families holding impartible ancestral estates has been rudely shaken by a recent decision of the Privy Council and requires consideration. Lastly, a law to prevent the small pattadar in a village from alienating his holding except to a very limited extent will I venture to think prove more beneficial even than the law which prohibits the alienation of an impartible Zamindary. These are some of the suggestions which have struck me as urgently required. Other suggestions of greater or lesser importance will readily occur to members of the legal profession. It should be our constant endeavour to infuse fresh life into our legal institutions. Adaptations to changing conditions are nowhere more important than in the field of law. Changes in legal institutions will be a capital factor in the formation of an active Indian public opinion and will prevent that tendency to run into grooves which is so destructive to the reign of thought and of character. The work of educating the community to accept these reforms should be undertaken by us without further delay.

Next, the position of beginners and juniors ought to receive our careful and sympathetic consideration. We have already adopted in Madras a resolution calculated to improve their position. It is not desirable that bright young men should at the very threshold of their career find themselves face to face with the difficulties inevitable in a strenuous and crowded profession. There appears to be a faint promise that many of our youths will hereafter turn away from the legal profession. I hope they will not flock to it in ever larger numbers. The position of Apprentices is even less satisfactory. After each law examination the successful candidates experience considerable difficulty in getting themselves apprenticed to practitioners in Madras. As soon as they enter into the ariticles of apprenticeship they have to prepare for an examination in the elaborate Rules of Practice and Procedure and find very little time to learn any real work. Naturally the average Bachelor-of-laws wishes to become a Vakil of the High Court and does not like to practise as a First Grade Pleader. He stays in Madras for the apprenticeship course and insensibly drifts into the habit of regarding Madras as his permanent home. If moffussil Vakils of some standing are enabled to take apprentices it will materially improve the chances of an apprentice learning something and will compel one to select before he becomes an apprentice the place where he intends to practise. In many ways the change will be desirable.

There is also the question of the training of Vakils' clerks which is not the least important of the reforms concerning our profession. A duly qualified and efficient Vakil's clerk will add to the prosperity and comfort of a practitioner. For he will do the work which the practitioner has now to do and will relieve the latter from many daily worries and anxieties and minimise the risks of blame and even worse which now face the practitioner.

Lastly it has been suggested that there should be a Co-operative Credit Society for lawyers. The question is being examined by some of us but no definite conclusion has so far been reached.

For effecting all these reforms and for the increased measure of service to the State and the community which the profession has to render in the future under conditions which are becoming exceedingly difficult as well as for the greater efficiency, independence and prosperity of the Bar, the co-operation of Barrister and Vakil is indispensable. Though one or two Barristers have joined us most of them have not done so. They view with understanding and sympathy our aims and efforts and I am confident they will become an integral part of our organisation if we provide for their adequate representation on our Committee and on the Board of Secretaries. The President of the Conference should in alternate years be a Vakil and a Barrister and the Barrister should have a class vote on any resolution which seeks to affect adversely their vested rights. I feel sure that the old jealousy between the Vakil and the Barrister is wholly extinct. While the Vakil should make all reasonable provisions to ensure the co-operation of the Barristers the latter will not I trust treat any longer as privileges what in the conditions of this Presidency are very real disabilities to themselves. Their prosperity is bound up with the prosperity of the profession as a whole and I would beg of them to remember that the evolution of the legal profession has been in the direction of equalisation of the privileges of all sections of the Bar.

One word more and I have done. I do not think that the Vakil Bar of this Presidency has realised its immense obligations to the late Sir Bhashyam Iyengar. For obvious reasons I do not like to enlarge upon the subject. The present strength and prosperity of the profession generally and of the Vakils in particular is I consider a more enduring monument to his memory than marble or bronze. It is however unjust to ourselves that we should not worthily commemorate his name either by erecting a statue or by founding a chair of law under the management of the Vakil's Association or a committee of this Conference.

Brother delegates, I trust you will forgive me for the unvarnished expression of views and suggestions that I have placed before you. I thank you most sincerely once more for having responded to the invitation and I hope that to-day and to-morrow you will lay the foundations of a stronger, more united and more useful Bar.

CONTEMPORARY LEGAL LITERATURE.

The Harvard Law Review for November has a lengthy article on Specific Performance in connection with Receiverships. For the purpose of this article the subject is divided into six heads (1) Cases of receivers after judgment to carry the judgment into effect, (2) Receivers after judgment under creditor's bills and by way of equitable execution and receivers in supplementary proceedings, (3) Equitable receivers who take possession and care of property, but who are not invested with the title to the property, (4) Receivers in Bankruptcy, (5) Liquidators or Receivers after dissolution of a Corporation, (6) Specific perfomânce of contracts entered into by the receivers themselves. The first head does not present any difficulty. In the second head the same criterion holds as in ordinary equitable receiverships ; and the question is has the party demanding specific performance any lien, charge or equitable interest in or against the property in the hands of a receiver and further more has such receiver the mere possession of the property or has he been vested by statute or assignment with title. Under the third head unless the statute specifically invests equitable receivers with title they do not have the full absolute title to the property which comes into their hands. They have however possession of such property and they are the care-takers and the defendants are the owners. This head is again sub-divided into contracts concerning land, and contracts not concerning land ; and these are again further subdivided into various sub-headings. Under the next main head of Receivers in Bankruptcy the writer points out that the receiver as distinguished from the trustee in Bankruptcy is not vested with the title to the property. Both receivers in Bankruptcy and trustees in Bankruptcy take the property subject to all charges, liens, and equitable interests except as are rendered invalid by the Bankruptcy Acts. If a third party entitled to specific performance against the bankrupt but for the Bankruptcy proceedings were to enforce his claim during the time of the management of the interim receiver and a deed of conveyance were necessary, a difficult problem would present itself as the receiver has no title and the bankrupt is divested of his property.

In such cases a deed from the trustee in bankruptcy after the property vests in him would be necessary.

Liquidators or Receivers to dissolved Corporations are distinguishable from ordinary equitable receivers in the fact that the latter are only custodians and care-takers of the property in their hands whereas liquidators and receivers after dissolution are vested by the statutes with title to the dissolved Corporation and frequently have statutory powers and duties. In such cases where there is a right to specific performance, proceedings should he instituted against such 'liquidator or receiver who could execute the necessary conveyances. There remains only the last question of contracts entered into by the receivers themselves. The English courts hold that receivers in entering into such contracts do so as individuals and are personally responsible and liable to such contracts, although if such contracts are properly and legally entered into, the receivers may be indemnified out of the assets of the trust state. The American Courts on the other hand hold generally that Receivers when they enter into such contracts, are officially liable. If however the receiver either under English or American rule enter into a contract without the authorization of the Court either expressed or implied then he must do so as an individual and be liable as an individual.

In the same number of the Harvard Law Review find an instructive discussion headed "must a new privilege be recognised in the Law of evidence." In a recent American case the question arose whether when a twevle-year boy confessed in strict confidence his part in the murder of his father to the juvenile-court Judge, whether the Judge can be asked to divulge the boy's confession in proceedings for murder and it was held in the affirmitive. Dealing with this case, the writer says, that is axiomatic in the law of evidence that the public has a right to every man's evidence. To this principle of course the law of previliged communications forms an important exeception. There is no previlege for confidential communications merely as such. But communications made in the course of a few specific relationships have been recognised as privileged from disclosure. In each the law accords the privilege purely on grounds of policy, because it considers that greater social mischief would probably result from requiring the disclosure of such communications than from refusing to insist upon it. To outweigh the undeniable social mischief of impeded justice, some relation, which it is imperative that the law should foster, and to the existance of which a privilege of silence is essential must be endangered. Obviously the number of such relationships is strictly limited; and the learned writer after discussing whether there is a privilege to a Judge not to be compelled to state what occurred in court in a case before him, holds that there ought to be a privilege flowing out of the relations between the infant delinquent and the juvenile court Judge and it should be left to the discretion of the juvenile court Judge whether to divulge the information or not.

The Law Quarterly Reveiw for October has an instructive discussion on the recent decision of the Court of Appeal in *Janvier* v. *Sweeney* and we reproduce the same here.

" Illness caused by sudden alarm or other painful emotion is as capable of proof and of being estimated in damages as any other kind of injury. Fright or 'nervous shock' may be a natural and probable result, not only of immediate fear of bodily harm, but of the impression conveyed by spoken words. If therefore, threatening words are used for the purpose of unlawful intimidation and coercion, or a false statement is wilfully made for the purpose of giving pain, and their effect on the person to whom they are addressed is to produce physical injury, we have the complete connection of an act calculated to do harm, and done without justification or excuse, and temporal damage consequent thereon, and there is no reason for denying a cause of action to the sufferer. This doctrine is finally established, we think, by the decision of the Court of Appeal in *Janvier* v. *Sweeney* (1919) 2 K. B. 316 confirming *Wilkinson* v. *Daunton* and *Dulieu* v. *White,* both well considered cases, as against the opinion of the Judicial Committee in *Victorian Railways Commissioners* v. *Coultas,* 13 App. Ca. 222 and minority of judgments in other jurisdictions which have taken the same line. It will be observed that the Court of Appeal did not think it necessary to call on counsel for the plaintiff. That being, so, the chance of the House of Lords overruling their judgment may be neglected.

The grain of truth in the contrary opinion is that a state of mind such as fear or grief is not in itself a tangible cause of action: the conclusion that bodily suffering consequent upon it is necessarily too remote to be actionable was hasty and illegitimate. Although this result is well within the lines of fairly old authority, it increases, to our mind, the difficulty of maintaining the view quite lately held by some very learned persons, that the Common Law does not recognise any general duty not to do harm to one's neighbour without justification or excuse. Such a cause of action as we have in *Janvier* v. *Sweeney* cannot be assigned to any of the old categories which were supposed to exhaust the law. It has nothing to do with defamation, and it was settled long ago (though not always) that words cannot amount to an assault. Neither is it analogous to any form of trespass or nuisance for no right of property is affected. A living human body is not property. What is the action then ? An innominate action on the case ? But then, what conjunction of harmful intention or reckless user with consequent damage can be formally excluded ? The supposed miscellaneous category is not really a supplement but involves a principle covering the whole ground. After all, *alterum non lacdere* is a very old precept, though the Romans never worked it out."

REVIEWS.

The Lahore Law Journal.—We are in receipt of two parts of the Lahore Law Journal a recently published periodical. It consists of two parts (1) Journal and (2) Reports with an exhaustive Index. We are told that care has been taken to report important cases, to produce in the headnotes exactly and accurately, what the Honourable Judges actually meant to decide in each case and to avoid bad and inefficient reporting. We are sure that if these ideals are constantly kept in view the journal will undoubtedly have a long and useful career. The two parts that we have seen, do certainly maintain a very high level and we have every reason to think that it will be maintained throughout. One important feature of the Reports is that there is editorial note under the report of the more important decisions which briefly considers the questions decided with reference to other decisions. Now that we have another High Court at Lahore, we have no doubt that this Journal will have a wide circulation in all the Provinces.

The Madras Law Journal.

PART V.] FEBRUARY, 1920. [VOL. XXXVIII

LAW REPORTING IN MADRAS.*

Of late, a feeling has been growing in some quarters of the legal profession in our Presidency that everything is not right with the supply of judicial decisions that we now have, through the *media* of non-official legal journals published in the metropolis. With some members of the profession this feeling has strengthened into a positive opinion that the existing state of things is a definite evil which requires to be immediately remedied. What the present measure of that opinion is, it is not possible now to gauge ; nor is it possible now to divine accurately the causes that have operated to engender that opinion, to enable us to test the soundness of the conclusions. But an opinion of this kind unconciously catches and spreads and is often given unconcious expression to by others, without those others arriving at the result by conscious thought and reasoning. Such a state of things is easily possible even with the members of the legal profession whose strength and claim to lead the nation lie in their very power of intellectual appreciation, their reasoned judgment and the consequential weight of their thoughts and utterances.

The reason for the insidious growth of such an opinion is not far to seek and is easily perceived. Owing to the growing increase in the number of the volumes of reports on the shelves of the law library, the lawyer feels himself at sea in the multitude of case-law surrounding him; and the turning over of pages of digests itself saps all his energies and leaves nothing for the higher work he has to do. It is evident that it is no longer possible for a lawyer to rely largely on his memory for decisions of import and value, not merely because they have enormously increased in number but also because the lack of uniformity in views propounded in judgments, the not too infrequent distortions of legal principles out of shape and form, and the fostering of pet themes and conclusions peculiar to individual judges, all alike tend to unsettle settled thought and as a necessary consequence render it almost impossible for the practitioner to decide as to the true scope and value of such decisions and allot each to its proper place in the evolution of legal thought. Nor can he avoid them. Every decision good or bad has its value to him. He needs them for his practice for the sake of his clientele; but he takes them up only with a sigh. It is, therefore, nothing unnatural that the lawyer of the present day should welcome any proposal which may possibly help to get rid of part at least of the cumbersome material, which, if it is made available, he feels he has to burden himself with. He could not shut himself out alone from what seems to him ghastly surroundings ; for he would be startled by his adversary in court on the next occasion. And, therefore, a remedy that would ordinarily keep all alike away from the encumbering and growing mass of decisions is welcomed. The difficulty is felt and no other remedy being available or feasible, the gagging of the existing law reporting publications is clung to as an effective source of relief. But in forming that conclusion the disease is not diagnosed and its spot located. The true scope and function of law reporting as a system is lost sight of and a consideration of the question as to how far our journals have digressed from the proper path is altogether ignored.

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* A paper prepared for being read at the Madras Lawyers' conference held on the 24th and 25th January 1920

The object of this paper is to place before the profession some aspects of the question with a view to direct the attention of the members to its true scope, so that in determining upon the root cause of the evil, its magnitude and the remedies for it, their judgments might be abiding and lead to the end sought without creating any unnecessary disturbance in the legal atmosphere.

To begin with, we should realise the true place and value of law reports in the system of judicial administration in our country. It is obvious that they have no value by themselves except with reference to that of the decisions they report, which marks the true measure of their worth. And as regards judicial decisions themselves, whatever might have been their value as precedents in days prior to the advent of the British, our existing judicial system,moulded as it is after the British system, recognises to a great degree their value and utility. As Lord Bacon observed "Judgments are the anchors of laws, as laws are of the state". In fact, judge-made law is one of our main sources of law and in that sphere they have a useful and valuable purpose to serve. Though precedents may, in the hands of the proverbially conservative lawyer, be an awful tyrant on occasions, they have nevertheless their value in enabling such of our judges as are liberal and broad-minded, to stimulate the symmetric growth of our legal system. The legal system which binds society together and helps its successes and blessings ought to be a living one. It must grow with the times and ought not to be allowed to stay without life or stagnate without motion. With the rapid national stride in the world of civilisation new conditions come into existence and new forces are set in motion which require corresponding adjustments in the legal sphere. The Judges of our country have to be trusted to shape the course of law to answer to the needs of the times for the reason that the necessarily cumbrous machinery of the Legislature cannot with ease bring us speedy or adequate relief.

Thus if we realise the importance of judicial precedent, not merly as a source of law, but also as a living centre of that system, we get to appreciate the true value and function of law reports. Towards the fulfilment of the purposes above mentioned, judicial pronouncements have to be collected and preserved and made available to the Judge, the lawyer and the citizen. They are required for reference and citation so that Judges may not be inconsistent ; "to the end that all Judges and Justices in all the several parts of the realm might, as it were, with one mouth in all men's cases, pronounce one and the same sentence," as Lord Coke said. They also help the Judges to make law grow harmoniously and where occasional discordant notes are struck, to restore the harmony as far as possible. When again the course of law requires to be led into a new channel, there too, the publication of precedents enables the diversion to be made without violence to and consistently with the force of the main current.

The members of the legal profession need the same; for they are but coadjutors with the Judges in making and shaping law, notwithstanding the jealousy of judges which makes them view their part with misgivings and suspicion. They have a duty not merely as lawyers but as leaders of society, which in every society they are, and rightly too. They alone lead where a new path has to be cut; they alone help to correct where a wrong course has been taken.

The people also require to know the law as pronounced by our Judges aud it is not without reason that judgments are required to be pronounced in open court. The maxim that every man is presumed to know the law equally applies to the law propounded in judicial pronouncements. The people have to abide by the law and guide themselves accordingly; and the purpose to be served in this aspect is the greater in view of the conditions here in India. We have no family solicitors or lawyers whose advice and help we seek generally for our transactions in life, as people in England and elsewhere do. Each man is his own lawyer here till a late stage, when perhaps the matter is beyond his reach and control. Oftentimes in our experience we come across cases where a litigant having an honest and truthful case, by his own ignorance so mismanages the matter that when his case comes to be judged by technical standards and rules, which the tribunal cannot divest itself of, difficulties and complications arise which even end in untoward results. Thus, publications of judicial decisions in reports have their purpose to serve for each, the Judge, the lawyer and the citizen.

What then is the proper scope of law reporting? Consistently with the purposes above mentioned, the law reports ought to give a true and complete publication of judicial pronouncements. The reporting must be accurate and the subject-matter full and complete. Whether the proper function of the editor extends also to an exercise by him of a censorial power of strict selection of the decisions to be reported need not here be considered. At any rate, such a power ought to be sparingly exercised. A precedent is authority as precedent whether it is published in the pages of a law report or is kept piled up on the grim shelves of the record room of the court.

Therefore, as Lord Lindley observed, there is a duty upon the editor of law reports to publish decisions of even doubtful utility erring rather on the side of commission than omission. Thus, as far as possible all decisions of Judges containing any reportable matter in the shape of pronouncements on any general topic of law, require to be reported whether they are ultimately found to be sound or unsound in the opinion of the legal profession. And from one aspect, it is well that they are so reported to enable the profession to rectify the error, if any, at the earliest opportunity, without affording scope for their being unearthed years later and supported by the conservative lawyer and Judge on the mere strength of their age. The danger is the greater when, as we find, the doctrine of *stare decisis* is relied upon by the Judges with equal certainty and assertion as well in the region of objective law, as in the region of substantive law.

Having thus defined the place of law reports in the Judicial system and also their proper scope let us proceed to examine what evils exist or are conceived to exist in the system of law reporting as it obtains in our Presidency.

We have the authorised series of the Indian Law Reports, the contents of which are by a negative legislative provision enjoined to be accepted by all courts in the land. Some time ago we did have a complaint against them, that they did not report cases speedily. But now, at any rate with the Madras series of the reports, that is a matter of the past and we have nothing to say against that set of reports. In addition, we have, primarily, four local unofficial publications. These latter add journalism to law reporting and are more or less useful in their sphere of work and successful as commercial ventures. There is yet another publication which we are prone to call a foreign publication, namely, the Indian Cases, which is a mere report and hails from Lahore. Another similar pulication has been recently started in the northern province and that closes the list. In this state of things, any reform that we may seek to make in law reporting can only aim at the evils supposed to be engendered by the four journals in our province.

I believe it is no complaint against the existing system that law reporting is not in the hands of the Government or of the

High Court. Whatever argumentative justification may be suggested in favour of the Government control of law reports on the assumption that law reporting in India should be regarded as a part of legislation, no lawyer at any rate, would wish for it. Nor is it likely that the legal profession would be willing that the Judges themselves should, by their own officers, publish their decisions. Lord Bacon has said "Let not the judges themselves meddle with the reports lest from being too fond of their own opinions and relying on their own authority they exceed the province of a reporter". An attempt in that direction made by the Sudder Court proved a failure and it is not likely that it will be repeated. And fortunately, law reporting in our province is not in the hands of mere commercial venturers irresponsible to the legal profession except in so far as they seek the patronage of its members for their own commercial success. The editing and publishing of our unofficial journals are in the hands of professional gentlemen who are amenable to the control of the Court and the censure of the profession and are keenly alive to their responsibilities as members of it. There is an editorial committee of gentlemen of the bar for some of these journals and we hope that they fulfil those responsibilities which the representation made on the title page enjoins on them to undertake towards the greater efficiency of the journals.

There is again no fault attributed to the existing journals, that the editors are in a position of uncontrolled freedom to report or not to report any particular decision as they please. We should rather wish that they had such a freedom; for that might remedy some part of the evil now alleged to exist. We would, at any rate, have then a direct hold upon our reporters. But recently the judges have ruled that no decision should be reported unless the previous sanction of the Judge or Judges concerned had been obtained. In fact the Judges have, in some instances, even the head-notes submitted to them for their perusal and criticism and therefore the reporters are not liable for any indiscriminate or erroneous reporting. Nor can any journal be found guilty of indiscreet omissions either, to report cases which require to be reported. The fair competition that exists between the journals to have sway over the legal world is itself an absolute safe-guard in that direction.

Further, there is also no an other fault conceived to exist in the unofficial publications. There is no complaint in regard to their contents or their method and plan of work. And even if any such should exist, that is no reason for clamouring for a reform in the system of law reporting itself. The defects may well be brought to the notice of the editor concerned, who, I am sure, will be equally anxious to rectify them. The tendency on our part to judge of these journals as if they were being run purely on commercial lines, ought to cease altogether.

The growing feeling referred to at the commencement of this paper has, as stated already, apparently been engendered by the increase in the number of law reports in recent years. There can be no doubt that the bulk of the volumes staggers even the lawyer with his capacious brain and his indomitable energy for work. The growing complexity of legal practice consequent upon the advance of civilisation, the increasing scrutiny to which his work is submitted by a society growing in knowledge, and not the least important among others, the guarded and strenuous fight thorough and prepared, which a competitor in the field, with the energy and leisure at his command, puts forth, all these tend to disturb the mental equilibirium of the anxious and worried lawyer and it is not surprising that in such a state of mind the growing volumes, in size and number alike, operate to aggravate and even exaggerate the alleged evil of the situation.

It is said that cases, good, bad and indifferent are all reported and the existence of these four journals in the field accounts for it. In the first place, the complaint, if any, should come from the Judges whose hasty utterances on one occasion might be used against them on another. If anything, having regard to the precedent-ridden judiciary that we have, the legal profession ought to appreciate that the platform on which they stand is made broader and more weapons are furnished to them. It is in our experience that Judges are slow, very slow indeed, to decide cases on principles and feel greatly relieved on the citation of a precedent, which the profession too may not consider as unquestionably sound. A mania for case-law rules the legal world and even in our saner moments we do not recognise the cause of our illness. Further owing to the diversity of views that exists here, and in the sister provinces, born of the subtlety of the lawyer and his resourcefulness in supporting them with arguments and authority, it is almost impossible for the editor to eschew decisions off-hand, as not worth reporting. We must also remember that our reporters themselves are not altogether free agents in the matter.

Nor is the multitude of the law reporting publications the cause of the supposed evil. There are not many decisions of value reported in any of the four nonofficial journals that are not reported in the others.

The cause for multitudinous reporting is very probably temporary. The increase in the number of our Judges, and the rapidity and despatch with which they overcame the accumulated arrears of years, have, to a great measure added to the volume o fdecisions that have been reported in the journals. In the happy and ideal state of things in which we now are, when our cases come up speedily for hearing and justice is meted out without delay, this cause for the evil must soon cease to exist. The tendency growing of late in some of our Judges to attempt to settle differences of opinion by references to the Full Bench ought to accelerate the desired end. We also hope that our Judges will realise that they do more harm and unsettle thought the more, by their throwing a cloud of suspicion on points which, however, they refuse to decide, than the good that they do by adding to the group of authoritative decisions on legal questions. This is an added cause for the discontent and the members of our profession who seek a reform of the law reports have ignored it altogether.

It is then said that the frequent repetitions of the identical decision in various reports tend to confuse the mind and make it impossible for the practitioner to lay his hand on any particular decision he wants. The gentleman who seeks to make that attempt in the third decade of the 20th century without referring to the digest, deserves certainly to be congratulated upon the task that he sets before himself and our sympathies go to him if he is thwarted in the achievement. But it can form no complaint of the legal profession as a whole. I do not know if, at all, it is the ideal for a lawyer to carry in his head not merely the principles and leading decisions establishing them and the manner in which those principles have been developed or modified by later decisions, but also every decision on every matter, as isolated units and not as component parts of an organic whole. Studied in the proper manner a decision once read from the pages of a journal ought, when it finds place in another, to be slurred by immediately on the very sight of it and there ought to be no ground for confusion of thoughts.

It is next said that it is too costly to the beginner in the profession to get for himself all the judge-made laws. This again is nothing so serious as to require any reform in the matter of law reporting. I do not think that those who have been subscribing only for some of the journals feel, in their practice, the necessity for subscribing for the rest. In fact, I do not believe, that all the journals should always be on the shelves of the lawyer. Many get on meritoriously without even any of them. I can personally vouch for at least two such instances amongst us in Madras and both the gentlemen I refer to are in the higher ranks of the profession. Moreover, as the learned Advocate General once observed, the absence of books near at hand on one's own shelves often gives that one an incentive to learn from another's, while the possession of books by him itself tends to make him put off and eventually neglect their study. I am sure that in the experience of each one of us we have realised the truth of this and we need not, therefore, sympathise with him who regrets his inability to adorn his own shelves with sets of law reports, as that would but insidiously encourage laziness and in the end prevent him from seeking and acquiring knowledge. Let those who could afford to buy all the books, have them. But let the man without them seek the pride that comes of the yearning for knowledge and the acquisition of it rather than the empty boast of having gilded and well bound volumes on his shelves.

Assuming, however, that a reform of law reporting in our province is called for at the present day, we find that the reformers conceive that the millennium will be reached if a device could be secured by which only one set of law reports will be published, which would attain such a high standard of efficiency and usefulness as to drive out of the market every other law report. But the question is whether the ideal sought is sure, safe, and abiding. There is also the question how best the ideal is to be secured and whether it is capable of being secured at all.

The ideal that we seek assumes that it is desirable that the particular law reports which we propose to introduce should ultimately enjoy a practical monopoly in the field of law reporting. But monopoly, whether acquired in fact, or conferred by authority of the State or of the Legislature, is not one of unmixed good and has always been condemned from before the days of James II when the Statute of Monopolies was passed. And whatever advantages there may be from such a system in the region of law reporting in rendering it much more easy for the editor to reject cases of little value or in his opinion such, history tells us that such a system is bound to degenerate and get stale, for the obvious reason that the stimulus of competition which always exerts a wholesome influence, would, on the basis assumed, be wholly wanting. In any event, as Mr. G. W. Hemming, once Editor of the Chancery Series of Law Reports in England stated, " which way the balance of good may incline is not perhaps quite easy to determine off-hand." There is no certainty that better results may be expected or that they would be lasting.

Then, as to the mode of securing that ideal, various courses may possibly be suggested. But above all, there must be co-operation and that is perhaps assumed, though the most difficult to achieve. All the branches of the profession must combine with one mind, one intent, and one interest, a matter for which one cannot *prima facie* vouch in the present state of the legal profession. We are not all of us of one grade and our duties and interests overlap those of each other. We have already realised that with our present system, the legal profession cannot grow and we shall have to devise a harmonious scheme for the proper adjustment of all branches and, if possible, the unification of all grades of the legal profession.

But till that is attained, there can be no real, no effective co-operation. Even now as we see the members of the Barrister and Advocate sections of the Bar have not joined us in this conference.

Granting, however, that co-operation is secured and that a combined organisation of all sections of the bar in the whole of the province agrees to take upon itself the publication of reports, we shall not still be on the certain road to success. In the first place, the successful control of such a journal by a board of management, necessarily constituted by the representatives of various bodies, would be almost impossible. There are the dangers of divisions and splits and all the evils of a management by many. Opinions must vary and lawyers do proverbially differ. And secondly, no enterprise, individual or combined, can successfully outlive the initial enthusiasm unless the individual or the body has a tangible interest to look to and protect. Mere theoretic or abstract interest in the growth of the law will not, I believe, be a sufficint stimulus to keep up life; and the lawyer is not inexperienced to realise the truth of this aspect.

Nor would that by itself be sufficient even, to enable the ideal in view to be realised. We must in addition secure a real "monopoly of authority", if I may use that expression, by proper legislative enactment; or we must compete in the market with or without the added facility of concessions or privileges of an exclusive nature which other publications in the field are either not given or are deprived of; or as a third alternative, we must buy up the existing journals.

Referring to the first of the three alternatives above mentioned, what I mean by "monopoly of authority" is, that exclusive advantage which is gained by a legislative injunction enjoining forbearance of citation of precedents unless such precedents are embodied in a particular publication. If such a right is not obtained there will be no real advance towards the goal and anything less will make the situation no better. A special privilege of having access to the records of the court, or even a negative provision in favour of the particular publication like what is contained in the Indian Law Reports Act will only land the new publication in a competition with other similar publications. And even this privilege of preferential citation may not be granted so long as the Indian Law Reports exist; for, there is no reason why, if competition is still to be the result, another report should take the place of the Indian Law Reports. The Indian Law Reports are quite as efficient as a publication of that kind can be. Particularly in Madras we have a vigilant set of reporters who have brought the reporting up-to-date and report cases speedily and accurately. And hence the necessity for the acquisition of the monopoly referred to, if really the end is sought to be gained directly without any competition.

But the question is whether the monopoly can possibly be acquired. We shall first require an enactment of the Imperial Legislature which would repeal section 3 of the Indian Law Reports Act in so far as it concerns the Madras series of Law Reports. Assuming that that is done, we require an additional positive enactment conferring a right or charter of monopoly for the intended publication, making that the sole authority for citation and discrediting every other as of no value. Is it at all likely that we could get such a thing? Will that not be trespassing upon our legal system itself and discounting the value of judicial precedent as a recognised source of law and as authority by its own force? [1] Is the authority as precedent to be denied to a judicial decision merely because it is not published in a particular report? Is there to be then one legal system for the province of Madras and another for the rest of India? Shall we not then be dividing ourselves, when the national cry is for unifying all the provinces? I take it we, at the Madras Conference, are not deciding for our brethren at Bombay, Calcutta, and elsewhere. We do not know that they want any reform in the system of law reporting at all.

Neither is it safe for the future that we should ask for and obtain such a monopoly. It may all be well so long as the control is in the hands of the legal profession but what a danger would it be if the Government or the High Court should turn round and take up the control of law reporting on the same lines. Would not the consequences be frought with greater evil than the vilest piece of legislation that we

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1. I. L. R. 28 Cal. 289 at p. 292, 3.

contend against ? I do not believe that the legal profession would welcome such a remedy even to avert the ill consequences of the existing system of law reporting.

The other alternative suggested is to run a competition. As I have stated, there is no necessity that we should supplant the Indian Law Reports in the competition, by securing the privilege of preferential citation. And the acquisition too by us of the sole privilege of access to the records of the court cannot give us any powerful start. It may even be that the learned Chief Justice may not be willing to withdraw from the editors of the current journals, the permission that they now enjoy to have access to the records of the Court. They have acquired vested interests which a lawyer particularly, ought by his very nature, to be zealous to protect. He cannot consistently with himself ask for their destruction where his own interests are concerned, but plead for their protection where it concerns others whose cause he advocates.

Even otherwise, the securing of the privilege for the benefit of the intended publication cannot keep out other journals from publishing their own reports. The High Court has no copyright in their judgments and the editors of non-official journals cannot be prevented from publishing them if they would do so without enjoying the special right of access to the records of the Court. Moreover, the prospect too is not quite promising. Lord Lindley, speaking of a similar favoured set of reports says " There were indeed what were called authorised reports published by reporters to whom greater facilities were given than to their competitors. ...... The authorised reports were a necessity to a limited class of men and had a sure and minimum sale. In some cases, unfair advantage was taken of this circumstance and dilatoriness, undue length and collections of rubbish were the consequence". I trust that we are not moving towards that end.

Then as regards competition. No system of competition with another can have a chance of success if it starts on an altogether different line. Competition itself cannotes but a run in the same direction and not in the opposite. If, therefore, we start the race, as we must, on the same pace and form as the existing journals, we are only further adding to the perpetuation of the existing evil and augmenting it by adding a fifth journal to the present ones. This ought to make one pause to consider before accepting the principle of competition; for, if we start in a new line, we do not compete and cannot therefore beat out the rest, and if we run in the same groove we are temporarily at least unnecessary and add to the existing evil.

Again, there is no certainty of success in competition either. The existing legal journals cannot be starved and made to die. At the most a journal or two may succumb, but not the rest. In any event the intended object cannot be achieved and history furnishes us with proof. The ineffectual attempt made by the Incorporated Council of Law Reporting in England, which was started with the object of killing in competition the Law Journal, the Law Times and the Weekly Reporter, stands as a beacon-light to those moving in the same direction. Those other journals only grew in vigour when the Law Reports were started aud continue to flourish to-day.

Then as regards the proposal to buy up the existing journals, it seems to me to be more fanciful than capable of realization. The journals that we have to buy up must be purchased at heavy prices; because our very course of conduct admits their success and consequent value and the sale also is not voluntary on the part of the seller. Having regard to the powerful body which resolves upon this scheme, an individual here and there may feel optimistic; but I am sure the majority will not be. And after all there is no guarantee that other journals may not be started in the future. It seems to me, therefore, doubtful wisdom to venture upon such a step.

Lastly, there is the question of the conscience of the legal profession in the matter. It cannot be denied that the belated Indian Law Reports did not satisfy the cravings of the legal profession. Un-official journals then gave us relief and we welcomed them. We have till now enjoyed all the beneficent and useful influences of those publications. Shall we be justified in discarding them now and that on personal grounds affecting individual members of the profession? Let us remember that though we may be the largest patrons of the legal journals, the purpose of their existence is not solely for us.

And let us not also forget that a report of a judicial decision ought like a photograph, to be a truthful representation of a matter of fact and can not be a work of imagination, and that the reporter or his report is not always at fault when his production fails to give us satisfaction.

We ought not also to be lead away by the success of the Law Reports isssued by the Incorporated Council of Law Reporting for England and Wales. The history of law reporting in that country and the evils which had to be remedied there, were of a wholly different character. In the early history of Law Reporting in England, the reports were published, in the words of the Lord Chancellor, Lord Westbury, " without any judicial control or sanction, nor is there any provision to secure correctness or security against error, but as soon as a report is published of any case with the name of a barrister annexed to it, the report is accredited and may be cited as an authority before any tribunal." The Law Reports were also started early enough and did not even seek any legislative authority or monopoly. In fact, the committee of the Bar in England, upon whose report the Incorporated Council was formed, did not even recommend the acquisition of a monopoly of citation. A subsequeut resolution to the same effect, that no case reported under the supervision and control of the Council should be quoted from any other report, was also negatived at the meeting of the Bar as unfair. The troublesome question of finance was easily solved by the offer of a great and wealthy publisher to undertake the responsibility. The conditions in India are different and let us not at this late hour of the day become iconoclasts and create a new system altogether about the ultimate success and usefulness of which none can predict. Let us not take a hasty step which after all may be a false one. Let us endeavour to make the best use of what we have and reform it where wecan.

The fault is also in ourselves that we are feeling choked. To quote from a learned writer in the Harvard Law Review, "there is no doubt that an intelligent and an united effort now can overcome even the difficulties we have been discussing. We can escape the crushing accumulation of authorities and opinions by referring to the principle which any especial line of cases lays down rather than to the particular cases themselves with their endless variation. Let us cease to be "case-lawyers" in the sense of seeking a precedent with like facts. It is the rarest chance to find a case which is on all fours with the one up for decision. It is an every day experience to find numerous authorities which enunciate clearly the principles that ought to determine the case at bar. When we have found that principle the cases are not important. Our system of precedent ought to be one of principles, not cases. Many of these principles are so clearly established that authorities in support of them are superfluous. If we find one or more of our "hard cases" which have departed from the principle, let us avow the error which such cases involve, and frankly cast them overboard, instead of seeking to distinguish them by ingenious sophestries. When the principle is clearly established and the cause to be decided manifestly governed by it, let us refrain from augmenting the mass of legal literature by further learned opinions. The pride of particular Judges and the feelings of individual lawyers may suffer in this process but nothing is accomplished without some sacrifice."

K. V. KRISHNASWAMI AIYAR,
Vakil, High Court, Mylapore.

SUMMARY OF ENGLISH CASES.

(Ellerman Lines Ltd., v. H. & G. Grayson, Ltd. (1919) 2 K. B. 514 C. A.

Negligence—Damages—Liability for—Contributory negligence—Effect of.

In an action for damages alleged to have resulted to the plaintiff from the negligence of the defendant, there are two principles which govern liability. Firstly, the plaintiff cannot succeed if he has been guilty of negligence which contributed to the cause of the accident; secondly, although the plaintiff is guilty of such negligence yet if the defendant could in the result by the use of ordinary care and diligence have avoided the mischief which happened, the plaintiff's negligence will not excuse the defendant.

Radley v. *London and North Western Railway Co.* 1 App. Cas. 754, relied on.

Masling v. Motor Hiring Co. (Manchester) Ltd: (1919) 2 K. B. 538 C. A.

Practice—Security for costs—Action of tort—Infant plaintiff—Power of Court to require security—County Courts Act 1888, S. 66.

S. 66 of the County Courts Act provides that when an action of tort is brought in the High Court by an impecunious plaintiff, the defendant may make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff; and thereupon the High Court may make an order that the action may be remitted to a County Court. The object of the enactment is that the action may be tried cheaply in view of the fact that the defendant, if successful, will probably not recover his costs.

Where therefore an action of tort is brought by an infant suing by his next friend, an order may be made under this section if the affidavit of the defendant shows either that the infant or that the next friend has no visible means of paying the defendant's costs.

Wild v. Simpson: (1919) 2 K. B. 544 C. A.

Solicitor and client—Retainer to conduct litigation—Subsequent agreement to receive portion of proceeds of the action—Champerty and maintenance—Illegality—Right of solicitor to costs.

Plaintiff, a Solicitor, was retained by the defendant to act for him in an action in which the defendant admitted the claim but counter-claimed for a large sum of money. During the pendency of the action the defendant became a bankrupt. The plaintiff, finding it difficult to get money for out-of pocket expenses, entered into an agreement with the defendant under which the defendant was to provide all out-of-pocket-expenses in the counter-claim as from that date, and fees to Counsel; in the event of the defendant succeeding in his counter-claim he was to pay plaintiff a percentage of the amount recovered ; and the plaintiff was to conduct the counter-claim to the end of the action on these terms and was not to look to the defendant for any costs except out-of-pocket-expenses if the defendant failed in the action. The defendant succeeded in his counter-claim and the plaintiff brought the present action to recover his costs on the original retainer, ignoring the champertous agreement entered into in the course of the litigation. *Held* by *Bankes and Atkin, L.J. J.* (*Duke, L. J.* dissenting), that as the original retainer was varied by the subsequent agreement which was champertous and therefore illegal, and under which the plaintiff conducted the subsequent litigation, he was not entitled to recover.

Ellingsen v. Det Skandinaviske Co.: (1919) 2 K. B. 567 C. A.

Practice—Costs—Two defendants represented by the same solicitor—Judgment for one and against the other—Taxation of costs.

In an action against two defendants judgment was given against one with costs and for the other with costs. The same Solicitor represented both the defendants. The successful defendant had undertaken to pay the Solicitor the costs incurred on behalf of the other defendant. *Held*, that the successful defendant was entitled to only one half of the items incurred for the benefit of both defendants, and taxation of the costs of the action should proceed accordingly.

Balfour v. Balfour : (1919) 2 K. B. 571 C. A.

Contract—Husband and wife—Domestic arrangement—Temporary separation—Allowance for maintenance of wife—No resulting contract.

The promise of a husband to his wife that while she is living absent from him he would make her a periodical allowance does not involve in law a consideration on the part of the wife sufficient to convert that promise into a binding agreement where the relationship of husband and wife exists and promises are exchanged, they are not to be deemed to be promises of a contractual nature. In order to establish a contract there ought to be something more than mere mutual promises having regard to the domestic relation of the parties.

Payzu Ltd. v. Saunders : (1919) 2 K. B. 581 C. A.

Damages—Breach of contract—Measure of damages—Duty to mitigate—Question of fact.

In assessing damages for breach of contract, the fundamental basis is compensation for pecuniary loss naturally flowing from the breach ; but this principle is qualified by another, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. The question what is reasonable for a person to do in mitigation of his damages is not a question of law but one of fact in the circumstances of each particular case.

Thirkell v. Cambi : (1919) 2 K. B. 590 C. A.

Contract—Sale of goods—Memorandum in writing—Proof of—Inference from letters repudiating liability—Solicitor instructed to deny contract, if an agent—Sale of Goods Act, 1893 S. 4.

S. 4 (1) of the Sale of Goods Act enacts that a contract for the sale of goods of the value of 10 £ or upwards shall not be enforceable by action unless "some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf."

A letter signed by the party or his agent, and referring to other letters as containing the terms of a contract may, although it repudiates liability on the contract, be a sufficient note or memorandum in writing within the meaning of the statute ; but if, while referring to other letters, it refuses to admit that they contain the terms of the contract it is not a sufficient note or memorandum.

A Solicitor instructed to deny a contract with which his client is charged is not the client's agent to make or sign a note or memorandum in writing of the contract for the purposes of the statute.

Crane v. Commissioners of Inland Revenue: (1919) 2 K. B. 616

Income-tax—Super-tax—Non-resident of—Finance Act, Ss. 66 and 72.

A person who is neither resident, nor in receipt of income in the United Kingdom is chargeable with super-tax if in the year preceding the year of assessment to super-tax, he was assessed to income-tax in respect of income exceeding £ 2,500 received in the United Kingdom. The existence of the English income in the year of assessment is immaterial.

Britain Steamship v. The King (1919) 2 K. B. 670 C. A.

Shipping—Charterparty — Ship requisitioned by Admiralty—Navigation without lights—Admiralty regulations—Collision—Loss of ship—Consequence of hostilities or war-like operations—Liability of Admiralty.

A steamship was requisitioned by the Admiralty on the terms of a charterparty under which the Admiralty took the risk of all "consequences of hostilities or war-like operations". In compliance with an Admiralty regulation that vessels should navigate at night without lights in order to avoid possible attacks by submarines, the vessel in question was navigating at night and without any negligence on the part of the master, collided with another ship and became a total loss. *Held,* that the loss was not a consequence of war-like operations and that the Admiralty was not liable.

The expression "War-like operations in a policy of marine insurance suggests some act done by one of two parties at war which each other against one of them or by one of such parties with the object of meeting or avoiding an actual or threatened attack by the other. There is a clear distinction between an operation of such a kind and one of a peaceful character conducted under conditions rendered necessary or desirable by the existence of a state of war.

Steven *v.* **Bromley and son :** (1919) 2 K. B. 722 C. A.

Ship Charterparty—Construction—Loading of different cargo from that contracted for—Higher freight—Right of shipowner to damages—Implied contract.

Where a charterer tenders for shipment cargo which is not that contracted for but is a different cargo for which the current rate of freight is substantially higher than the agreed rate for the cargo under the charter, the inference may be drawn that the charterer has requested the ship-owner to carry a substituted cargo on the terms that he will pay the current rate of freight for cargo of that description. The new contract does not take the form of an offer made in writing by the charterer and accepted in writing by the shipowner, but it may be inferred from the tender of a cargo by the charterer to the captain, a man who to the knowledge of the charterer is not in a position to vary the original contract. This is a continuing offer which the owner of the ship may accept as soon as the act of the charterer comes to his knowledge.

Thelluson *In re*: (1919) 2 K. B. 735 C. A.

Bankruptcy—Money lent to debtor—Ignorance of debtor and lendor—Right of trustee in bankruptcy to retain money—Duty of Court.

The Court in bankruptcy ought not to allow its officer to insist upon a rule of law or equity in the administration of an estate in bankruptcy under the control of the court, where such insistence would produce an unjust and dishonest result. The court directed the Official Receiver to refund certain moneys which had come into the debtor's hands by mistake though an action for the recovery of the moneys would not lie in a court of law or equity, at the intance of the creditor.

Peter Dixon & Sons. Ltd., v. Henderson, Craig &Co., (1919) K. B. 778 C. A.

Contract—Suspensory clause—Sale of goods—"Delivery prevented or hindered" by war—Difficulty of shipping—Right of sellers to suspend delivery.

A contract for the sale of goods, to be delivered in instalments of 5,000 tons a year from 1911 to 1917, contained a "force majeure" clause that delivery under the contract might be suspended pending any contingency beyond the control of parties which "prevents or hinders . . . . . delivery . . . . *viz*, Act of God, war" etc. The sellers duly made deliveries under the contract until the commencement of the war, when serious difficulty arose in carrying out the contract. It was found that British ships were no longer available for the trade, though foreign ships could be obtained at increased freights, that the Admiralty regulations lengthened the voyages and that there was liability to capture by the the enemy or loss through mines and submarines, and delay by detention by British or allied warships. In an action for damages for non-delivery. *Held* that the position had been so changed by the war that the sellers were "hindered" from carrying out the contract within the meaning of the force *majeure* clause and were therefore entitled to suspend delivery. *Tennants Ltd.*, v. *Wilson & Co.*, (1917) A. C. 495 Relied on.

Everett v. Everett and Mc Cullam : (1919) P. 298.

Divorce—Wife's suit for judicial separatisn—Adultery—Cruelty—Condonation—Connivance—Effect of.

A wife living in adulterous alliance, even though brought about by the procurement or connivance of her husband, cannot maintain a suit for judicial separation. The connivance of the husband does not take the case out of the rule laid down in *Otway* v. *Otway* (1883) 13 P. D. 141.

Croft v. William f. Blay Ltd : (1919) 2 Ch. 343 C. A.

Landlord & tenant—Holding over—Implied tenancy from year to year—Original lease for one year and part of another—Date of commencement of new tenancy—Notice to quit.

A tenant holding over after the expiration of a leave, if he pays rent or agrees to pay rent subsequently, becomes, if no other terms are suggested, a tenant from year to year—a yearly tenant ; and the tenant holding over is deemed to hold upon all the terms and conditions of the original tenancy so far as they are applicable to a yearly tenancy. Where a tenant in holding over after the expiration by effluxion of time of a previous lease for a period of a year plus a fraction of a year, the implied tenancy from year to year does not commence or the anniversary of the commencement of the original term, but from the beginning of the new year.

JOTTINGS AND CUTTINGS.

Counsel's fees.—The great cotton law suit in the Vice-Chancellor's Court at Manchester, in which nearly thirty counsel are employed, has provided an occasion for more than one comment upon the growth upon counsel's fees. It appears to be assumed, because some of the Leaders in the case have fees of 3,500 guineas marked upon their briefs, that the rewards of advocacy have become unprecendentally large in recent years, The assumption is not well founded. Lord Truro received a fee of 4,000 guineas for arguing the famous case of *Small* v, *Attwood* before the House of Lords in 1838. (The fee originally marked was 3,000 guineas, but the Searjent's clerk—Lord Truro was Searjent Wilde in those days—insisted upon another thousand.) The hearing of the appeal for which this handsome fee was paid lasted for forty-eight days—some eighteen days longer, therefore than the Chancery case at Manchester is expected to occupy. In Lord Brampton's most flourishing days at the Bar counsel's fees were even higher. 'Llyod' he writes in his volume of reminiscences of his chief adversary in compensation cases 'must have made 20,000 a year with the greatest ease.' He does not conceal the pleasing fact that his own professional income was even larger. 'No expectations of mine,' he adds, 'ever came up to its amount, and even now, when I look back, it seems absolutely fabulous.' To Lord Brampton, too, belongs the distinction of having refused the highest fee ever offered to an English advocate. He declined an offer of 50,000 guineas to go to India to defend the Gaekwar of Baroda a task which Searjent Ballantine eventually undertook for a smaller, if very substantial sum. Nobody has any right to complain of the large fees which the foremost men of the Bar can command, since nobody is obliged to employ their services. It is entirely a matter of supply and demand. But, what is, no doubt, a legitimate ground for grievance is that a rule has come into operation under which a junior's fee must be two-fifths of his leader's. This is a professional rule against which the members of the Law Society protested more than once, but the two representative bodies of the profession though they have been in negotiation on the matter, have failed so far to arrive at any satisfactory result. *Law Journal, January 10, 1920.*

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Doctors as Witnesses :—In an undefended Divorce case on Tuesday (*Garner* v. *Garner*) in which a doctor was subpoaened to give evidence in support of a wife's charge of cruelty, on the ground of communication of venereal disease by the respondent, Mr. Justice Mc Cardie, while commending the loyalty with which members of the medical profession respect the confidence reposed in them, required the doctor before him to give the desired testimony as to the respondent's condition, though the doctor himself was unwilling to give it. There is, no doubt, ample authority for saying that medical practitioners are not privileged from disclosing in the witness-box confidential communications made to them by patients. The only professional communications, indeed, which can be definitely said to be privileged are those between counsel and solicitors and their clients. In the famous trial of the *Duchess of Kingston* (20 St. Tr. 355) where a witness had taken an oath to the prisoner that he would not reveal what was said to him. Patteson, J. said "These oaths are very wrong and wicked, but still they are not binding, and every person except counsel and attorneys is compellable to reveal what they may have heard." It is even difficult to say that it is an absolute rule that disclosures made to ministers of religion are protected. Judicial opinion has varid. Several cases are mentioned in Russell on Crimes in the Chapter dealing with evidence in which ministers of religion including even Roman Catholic priests have been required to disclose the confessions made to them while an equal number of cases are given in which Judges have declared that such communications were privileged. In *Rex* v. *Griffin*

(6 Cox 219) in which a woman charged with murdering her child had made statements to a Workhouse Chaplain, Baron Alderson while holding that these statements ought not to be given in evidence, was careful to add that he did not lay this down as a definite rule.' If, then, many Judges have departed from the definite rule laid down in the *Duchess of Kingston's case* by protecting communications made to ministers of religion, there seems no reason why some occupant of the Bench should not be sufficiently bold to give a similar protection to disclosures made to medical men. There were special reasons why Mr. Justice McCardie might have taken this course in the case before him in the Divorce Court. The information which he required the doctor to reveal was obtained by him as a medical officer at a hospital which had adopted the Government scheme for dealing with venereal disease, and one of the Regulations made under the Public Health Acts in connection with the scheme provides that all information given by sufferers shall be treated as confidential. The principle upon which the communications made by clients to their legal advisers are privileged is that it is desirable in the interests of justice that such communications should be unfettered. Upon the same principle the like protection for communications made by patients to their medical advisers may be urged. Public policy is the only test and the continuance of the hard-and fast rule compelling medical men, to disclose in the witness-box what was revealed to them in their consulting rooms—a rule which may deter some persons from consulting them at all in certain cases is, certainly not likely to assist the Government in carrying out its schemes for the improvement of the public health. *Ibid January* 17,1920.

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Adjournments and Convenience of Counsel.—The Lord Chief Justice was asked by Mr. T. Cathew on Tuesday (*i. e.*, 13th Jan. 1920) to postpone the hearing of a case until January 27 for the convenience of all parties. In answer to his Lordship, counsel said that Mr. Doughlas Hogg, K. C., who held a brief in the case was engaged in Manchester. The Lord Chief Justice said thatthese applications caused great difficuty in arranging the lists. He did not intend in future to grant any application for the postponement of cases for the convenience of counsel, except in; very special circumstances. The practice of arranging dates to suit counsel had led to great embarrassment to the Court. Cases were put in the list before their turn really came, with the result that the waiting list was filled with cases that had been passed over to suit counsel. During the last sittings he (his Lordship) had great difficulty in finding cases to try. It must now be definitely understood that the Court would set itself against allowing cases to be postponed merely to suit the convenience of counsel. There was no reason why a junior should not be protected as well as leading counsel and the Court would make no difference between the leading counsel and a junior. The old practice must now be reverted to that cases must come on in their turn. The case in question would not stand over until the 27th, but he would allow it to stand over until the 20th so as to enable other counsel to be briefed. *Ibid. January* 17, 1920.

CONTEMPORARY LEGAL LITERATURE.

In *The* "*Bench and Bar*" for July 1919, there is an article on "Symbolical Delivery of Gifts Inter vivos". Under the Common Law of England a gift is not valid without delivery, while under the Civil Law it was otherwise. The writer then points out how the direct reverse of it is stated to be the difference between the two systems by Lord Coke in *Wortes* v. *Clifton* 1. There are many strong expressions in the books against sustaining donations either *causa mortis* or *inter vivos* without actual delivery, the reason of this attitude is due to the fact that gifts of both classes are usually claimed on parol evidence unsustained by any writing and the courts have uniformly set their faces against such claims on account of the great danger of perjury. In determining whether there has been a valid delivery, the situation of the subject of the gift must be considered. The subject of a gift may be chattels, choses in action, or any form of personal property, and what constitutes delivery may depend on the nature and situation of the thing given. The cases in which the delivery of a symbol have been held sufficient to perfect the gift, were those in which it was considered as equivalent to actual delivery, as the delivery of a key to a trunk, a room or a warehouse, which was the true and

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(1) 1, Rol. Rep. 61.

effectual way of obtaining the use and command of the subject. A gift of bonds, notes, or choses in action may be made by delivery of the instrument representing the debt with intent to make a gift, and a gift of a debt may be made by delivery of a receipt acknowledging payment. The English Courts have entertained a liberal indulgence to sustain gifts even where the chattels have remained in possession of the donor, and he has retained dominion over them. See *Barlow and wife* v. *Heneage* [1] *Clavering Clavering* [2] and *Jhonson* v. *Smith* [3], This view is not broadly shared in by the American tribunals. And the writer concludes by saying that it is impossible to lay down a rule by which one can positively determine what is and what is not an effectuated valid gift ; and each case must undoubtedly be judged on its own facts, but one may safely assume in view of the latest cases that where there is some written evidence of the gift and no intention of fraud, the Courts will be inclined to uphold the gift.

The August number of the Magazine has an article on the "Crime of Disorderly Conduct" in which the action of City Magistrates in trials of persons accused of the so-called crime of disorderly conduct is disapproved. Due either to their misconception of the gravamen of the offence, or to a desire to clear a crowded court calendar, the Magistrates hurry through the trial, and the unfortunate victim is invariably found guilty on little or no evidence. A flagrant, injustice due to this haphazard procedure was recently perpetrated and when it went on appeal received very severe strictures from the Appellate Judge and the writer hopes that after the reversal of the conviction and the attitude of the Appellate Judge in the case, a healthy atmosphere for these cases will be created in the Police Courts and the giving of character evidence with its deserving consideration will be encouraged.

The September number in an article considers Mr. Clarke's contribution to the "American Law Review" on the Trial of the Kaiser for violations of the Hague conventions constituting murder and his opinion that upon conviction the Kaiser may be executed. The legal difficulties of the trial of the Kaiser for murder, are considered and after examining the international aspect of the question, the writer comes to the conclusion that in the case of the Kaiser and his satellites the ends of justice would perhaps be best subserved by placing them all under impenetrable guard rather than by the infliction of the death sentence.

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[1] Precin. Ch. 210, [2] 2 Vern. 473.
[3] 1, Ves. Sen, 314.

The Canadian Law Times for June 1919 has the following extract from a letter by Mr. Alexander Stuart, K. C., respecting the disposing of the costs of litigation :—

" The universal practice is to make the man who loses pay the penalty of the other man's costs, no matter how honest his conduct, how reasonable his grounds of action or how much support he has in the advice of counsel or in the judgment of a Judge of first instance. A litigant like every other man ought to pay for services rendered to him, but, if I concede that in every case where there is no division of judicial opinion the penalty of losing should be paid by the loser ; I confidently affirm that it ought not to be so when Judges differ in opinion on the law or other merits of the case, or there is an honest conflict on the substantial facts.

Let me cite a case where ruin came to a man on this iniquitous principle. He asserted that by misrepresentation or concealment an exhaustive burden was imposed on him and secured on his farm and he resisted its enforcement. The trial Judge agreed with him, The Court of appeal divided two against two, and thus the judgment of the trial Judge in his favour was sustained. The other party appealed to the Supreme Court of Canada where he won by three Judges to two, and the costs of all the courts were awarded against him. These costs would not be for services rendered to him because the solicitors for the other party rendered him no services, but as a penalty for his having resisted the appeals made by the other party after he had got judgment once in his favour, and as a penalty for having resisted an action which he won before the first Judge.

It ought to be enacted that where on a trial there is in the opinion of the Judge an honest conflict in the evidence, or where he has found that judicial opinion has wavered from side to side of a finely-drawn line of distinction, he must exercise a

a judcial discretion to decide that each party shall pay for the legal services rendered to him, that is, shall refuse to impose a penalty for the litigation on the losing party, and that in every case where a party has obtained a reasoned judgment in his favour he shall in case of a reversal of that judgment not be obliged to pay the penalty of the other party's costs because he endeavoured to sustain the judgment first given in his favour, but that it be sufficient that he get no costs of the trial or of the appeal and that he shall pay a penalty if he fails on a further appeal from the last judgment against him.

If an enactment of that kind were made it would establish the principle that penalties are imposed only where there is moral wrong or manifest perversity. It would remove the odium which in the minds of many people attaches to the administration of the law, and would save too many honest men and women's serious heart-aches."

It would be interesting to notice in this connection that a similar point was considered by the Madras High Court in *Ramaswami Naicker* v. *Venkataswami Naicker* [1].

BOOK REVIEWS.

The legal World: A monthly legal periodical published by MESSRS KING AND CO., PARVATIPURAM.

We are in receipt of the first number of the first volume of this Journal and have gone through its pages carefully. There are many noticeable features of this publication which distinguish it from the other existing legal Journals. The first part of the Journal is devoted to giving sample forms of pleadings and intended for the betterment of its present unsatisfactory and inartistic state which has been so often commented upon in judicial decisions. Then follows an article on some legal topic of interest. Following it are given the statements of the objects and reasons of the current Indian statutes ; of the utility of this portion we are not without doubts even to the practitioners, for it has been authoritatively stated by the highest tribunals that they are no guides in the construction of the statutes and instances are not wanting where the direct contrary of the intentions of the framers have been given effect to on the language of the enactments. Next there is a report of English decisions of interest to India. We cannot too strongly emphasise on the usefulness of this portion of the Journal to the legal profession in the mufassal where the English Reports are not available at first hand for study. At the end of the report of each English case is a discussion of its scope and applicability to the conditions in this country. This journal is thus in many ways a highly useful one and we would strongly recommend it to the use of the legal profession. One of the commendable features of this publication is that precuniary profit is not the aim of its promoters and they care particularly to the quality of the matter supplied.

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[1] (1919) 37 M. L. J. 271.

West and Buhler's Hindu Law Fourth Edition Revised by DR. ABDUL MAJID. MESSRS SWEET & MAXWELL LTD., LONDON, (TO BE HAD OF MESSRS R. CAMBRAY AND CO., 9, HASTINGS STREET, CALCUTTA).

We are thankful to Dr. Abdul Majid for having revised and brought up to date a work of high authority on Hindu Law. Since the publication of the last edition of this work, there has been such a large collection of case law on the subject and change of views on so many topics that a revised edition of the original author's treatise will be more difficult of production than the publication of an altogether new treatise on Hindu Law. But the authority of books like this consists more in the weighty opinions expressed by the original authors on the various questions that are likely to come up for decision, than in the collection of cases added at the revision. So far as we have been able to see the original scheme of the work has been preserved fairly well and later cases have been inserted in their proper places. Dr. Abdul Majid claims to have brought all the subjects dealt with up to date fully discussing the various views held on them. But we would expect a fuller discussion on many questions. To take one instance we do not find any discussion of the consequences of the decision of the Privy Council in the *Jagampet case* (I. L. R. 25 Mad. 678) and that case itself is only referred to in one place and the many difficult points that it has raised in the several High Courts have not been adverted to. Unfortunately also this edition seems to have taken unusually long time in going through the Press so that some of the most important decisions of the Privy Council more than one year old at the date of the publication had to be relegated to the addenda and could not be referred to in the body of the work. The get up of the book is excellent and we have no doubt that the profession will appreciate the services of Dr. Majid in bringing out the edition in the midst of his practice.

The Madras Law Journal.

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LEGAL EDUCATION.*

A new spirit has taken hold of the educational world. The air is full of ideas of educational reconstruction and reorganization. The aim of education is no longer the development of the individual, but the making of man the citizen. A new synthesis is demanded between the needs of the individual and the needs of society. An epitaph has been written on the older Universities.

This new educational perspective cannot but have its influence on our ideas as to a sound system of legal education. The growing sentiment in the world of legal study at the present day is that the object of legal education is not merely to make the future practising lawyer but also to give him such a training as will enable him to serve the larger interests of the country. In the memorable words of President Taft "the country must train lawyers of the right sort and of the old spirit to advise or it must tumble through a very chaos of blind experience. It needs lawyers who are also statesmen more than it needs them now. It needs them in its courts, in its legislature, in its seats of executive authority,—lawyers who can think in terms of society itself." The same sentiment is echoed by Lord Haldane in his famous address on "Higher Nationality". If President Taft and Lord Haldane are expressing the real needs of England and of America, there can be no gain-saying as to the wisdom of those words and their applicability to Indian conditions in spite of the sedulous attempts in certain quarters to distrust law and lawyers in this country. In the new era and under the new dispensation, the lawyer has necessarily to play a more important part than even in the past. But to fulfil this function, it is necessary "that those whose purpose it is to practise ought to be held to make proof of their studies, of their capacity, of their good morals and of their probity." "The legal profession concerns itself too closely with the fortune, the honour and life itself of citizens to afford to be neglected." The field of legal studies has to be widened and strengthened to suit the new ideal.

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* A paper prepared for being read at the Madras Lawyers' Conference, held on the 24th and 25th Jan, 1920.

Our University has taken up the question of educational reconstruction and University reorganization and has appointed a committee or committees to consider the proposals as to educational reconstruction suggested by the Calcutta University Commission, composed of some of the most eminent educational authorities of the day. I have no doubt that the committee will approach the great question before the country in the right spirit and with the right perspective. I am glad to note that in the committee there are some of our most distinguished lawyers and we can trust to their not neglecting the reorganisation of legal studies amidst their manifold work and their attempts in the direction of formulating proposals for the general educational reconstruction in this Presidency.

The reform of legal education, the methods and curricula of legal studies, the reorganization of institutions devoted to the teaching of the law, the relations between the profession and the study of law in the schools cannot be solved without reference to prior history or without a clear idea as to the principles in the light of which legal education has to be moulded. A study of foreign institutions while it may be helpful cannot be the sole guide, for the very good reason that the conditions obtaining in foreign countries, England, America or elsewhere are due to historic accidents. My only apology in indulging in a digression by making a passing reference to the systems of legal education obtaining in England or elsewhere is the hope that they may throw some light on the problems with which we are confronted.

The System of Legal Education in England.

In England it is curious to note that the right of entry into the freest of professions rests with societies which claim a monopoly contrary to the spirit of the law which distrusts all monopolies. The authority of the Inns of Court dates back to the time when the clergy were for the first time prohibited from practising the law and a Court of Common Pleas was established. Earnest students of the law intent upon studying the law of the land and practising the profession gathered together in inns or hotels, formed themselves into a brotherhood so to speak, discussed legal problems over the table and the beer. These brotherhoods gradually developed into " Societies self-constituted, self-governed and possessing by prescription the right of investing their members with the privilege of audience in the courts of the Kingdom." We are not concerned here with the constitution or the history of these Inns.

General Features.

Suffice it to notice the general features of the legal education or better legal training in these Inns up to the seventeenth century. The most important feature is of course the distinct legal atmosphere which at all times permeated the Inns. "Questions emanating from the Bench tables pass through all the hall and were discussed by the students over their ale." "There were moots held in every part of the Inn, and in the chambers of the Barristers. These moots remind one of the case-system of study which has developed in the American law schools during the last half a century. The instruction through these moots was supplemented by exposition on selected topics by readers appointed for the purpose. The reading was always followed by a discussion. In addition to these readings and the moots, the students of course carried on their independent study of the law. These are the three main features.

The study of the law under these conditions and in intimate contact with the judge, the barrister and the reader has not a little contributed to the development of the law up to the seventeenth century and the Inns were in those days real universities of legal learning saturated with a true university spirit. In course of time their interest in legal education declined and the training afforded to the members of these Inns became one of a very inferior quality. In 1852 at least with a view to see that there is some guarantee that the member who is called to the bar has the necessary equipment to practise the profession, a Council of Legal Education was constituted under the authority of the Inns. The residential system is not insisted on at the present day. A member of the Inn is merely to keep his term. Lectures are no doubt delivered under the auspices of distinguished men but it is entirely optional to attend the lectures or not. The student may learn his law either at home or by a course in the University. An examination of the existing English system obtaining in the Inns shows that the old skeleton is there but without the spirit, the body without the soul. At the same time, the Inns of court are jealous of any outside interference. The obtaining of the highest degree either in Oxford or in London does not entitle the ablest graduate to practise the profession of law.

The Amrican System.

In America until probably the beginning of the nineteenth century formal legal education in a school or college was unknown. The traditional method of entry into the profession was through the portals of a lawyer's chambers though an examination of some kind was insisted upon by some of the States. The education which he picked up was just as much or as little as he could by a study under a lawyer. During the last century however a net work of law schools of the grade of colleges has been started throughout the length and breadth of the country. Systematic instruction is imparted in these schools. The two systems of legal education, reading in the lawyer's offices and study in the law schools, exist side by side. But "on the whole" legal education has passed from the control of the practising lawyer to the domain of the schools and "office" training is looked upon as auxiliary to law school studies. But as yet there is no formal connection between the right of admission to the profession and a study in the law schools though a systematic study must necessarily place an aspirant to the profession on advantage ground. A three years' course is insisted on in almost every school. An intimate connection is maintained between the professorial body and the legal profession. Some of the earlier American teachers were either themselves Judges or leading lawyers of the day. At the present day no doubt law-teaching is taken up as a separate vocation by some of the lawyers but the teaching profession is mainly recruited from the ranks of the practising lawyers who have had sufficient experience in the practice of the law. The leading teachers in the law schools are themselves members of the great American Bar Associations. An important committee of the central American Bar Association concerns itself mainly with the problems, of Legal Education. Its resolutions or proposals though not of binding authority on the schools at least shapes the method and curricula of legal studies. The students in these Law Schools are brought in frequent and intimate contact with the leading lights of the profession through the medium of their moots. The intimate relation between the teacher and the practising lawyer enables the teacher to aid the student and the practising lawyer in placing the right student in the right office. There is a close personal association between the teacher and the taught and the student looks for guidance and advice to his teacher in his every-day work. Student societies have legal periodicals of their own and able students discuss legal topics in these periodicals. The chief method of legal study and instruction is not the lecture method as obtains in Germany and also to some extent in England but what is known as the case method of study. As Mr. Harold Haseltine points out in two well-informed articles which he contributed to the "Law Quarterly" "the prevailing American method may be described, as conversation classes based on the students previous reading and a study of previous cases systematically arranged in case books which omit the head notes of the original reports. This system is now believed by almost all the foremost public teachers in the United States to constitute the most effective means of arousing students' interests, developing his reasoning power and his grasp of legal principles." With regard to the curriculam of studies, while emphasis is rightly laid upon the Anglo-American system of common Law and Equity great attention is paid to the study of Constitutional Law, Administrative Law, Comparative Jurisprudence, and International Law. If the success of a system is the test of its soundness and efficiency there can be no doubt that the American system has a good deal to teach to the rest of the world.

New fields of law have been explored. The practising lawyer has become the expert legal counsellor to the State. The professor has done yeoman service in the field of constructive legislation.

Essentails of a sound system of Legal Education.

A brief survey of other systems reveals that the efficiency of a system of legal education depends upon the following factors :—

1. The atmosphere of law and lawyers with which the student is surrounded.
2. The legal habit of thinking which the system promotes.
3. The sytematic study of law in the schools and colleges, regard being had to the scientific ideal of education and the practical needs of a profession.

These three points have to be steadily and steadfastly kept in view in considering the subject of legal education in any country. It is with some feeling of trepidation that I approach the consideration of legal studies in this country. If the success test in the narrower sense alone is to be propounded, it may be said with some force that there is nothing to be urged against a system which has within half a century produced some of the most eminent lawyers and Judges of the day and has brought into existence a legal profession which in spite of its short history can bear comparison to the profession in other parts of the world with a history dating back to the twelfth or thirteenth century. But I am one of those who believe that it is not so much the character of the education that is imparted in the Law schools as it is the subtlety and special adaptability of the Indian mind to legal - analysis and legal reasoning that is responsible for its results. And I feel confident that if only the problem of legal education is tackled in the right spirit and in the right manner, India will produce not merely great advocates but also great International Jurists, legislators and legal thinkers.

The Indian System : Its defects.

Judged from the three points of view above referred to there is a good deal to be said against the system of legal education as now obtaining in this country. There is no atmosphere worth speaking. Until recently we have not had even a regular Law College to boast of. Residential system is hardly insisted on. There is nothing like an intimate contact between the teacher and the alumni of a Law College. We have to search in vain for any real co-operation between the profession as a whole and the college of legal studies. The virus of an examination system as much infects Legal Education as other parts of the educational system. The system of lectures to students as a mass is as much in vogue within the precincts of the Law College and as in the Arts Colleges. A good deal of printed matter is converted into manuscript and is dictated to the students. Predigested food is given to the Law students putting them in the same position as invalids. The course of studies is altered and re-altered without any apparent guiding principle. A systematic course of instruction in English Law, the codified law of British India based upon the whole field of English Law and Equity and a study of the complicated personal law of the Hindu and the Mussulman is unthinkable under a two year course as it obtains at present. The term of two years naturally restricts the scope of legal studies and there is no such thing as optional courses in important branches of public law to afford facilities for wider study to the best student. In the curricula of legal studies and the method of examination distinction is not kept in view between subjects which are studied because they form the positive law of the country and subjects which are studied merely to promote the legal habit of mind and to initiate the students into the principles of the law. The staff is undermanned and there is nothing of real tutorial guidance to the students. College Professors or even leading members of the profession are not called upon to deliver any special lectures on important topics. The profession as such exercises very little influence over the policy of the Senate in regard to Legal Education. The provision in the Universities Act enabling particular faculty or faculties to be strengthened by the leading members of the profession is a dead letter. The faculty itself is not particularly active and the Senate takes at best only a step motherly interest in Legal Education.

In cataloguing these defects I am not unmindful of some of the merits of the existing system, and the various improvements effected and attempted in recent years by the energetic and enthusiastic principal of the Law College. The B. L. Examination in the University of Madras sets a much higher standard than corresponding examinations elsewhere. The College Library has been very much expanded and I learn that in some respects it is better than the High Court Library. Some attempt was made to introduce conversational classes to supplement the general lectures, but I am informed that the system had to be practically given up owing to the shortening of the period to two years and the large number of subjects that had to be got through and the weakness in numbers of the staff. Moot courts were in work for some little time but in such large dimensions as to give opportunity to only very few students and I am assured that during the last year or two that system had practically died out.

So much with regard to the merits and demerits of the existing system. Now as to the suggested remedies.

The needed reforms in this Presidency.

I now propose to deal with what according to me are the needed reforms in Legal Education in this Presidency under the following heads :—

1. The duration of the course of studies in the College.
2. The method of legal studies.
3. The curricula of legal studies.
4. The organisation and staff of the College.
5. The relation of the University to the College and to the professors.

I. Duration of course of study.

As preparatory to every other reform I believe it is necessary that a 3 year course should be insisted on for all students as it is impossible that a student could have the benefit of any systematic course of instruction with a large number of subjects crowded into a short space of two years. As already pointed out a three year course is prescribed by most law schools of standing and repute in the United States which also like our University require a degree in Arts as an essential pre-requisite for admission into the Law course. The tendency in recent years in America if any is to prolong the course and not to shorten it. The Calcutta University insists on a course of three years. And the members of the Sadler Commission are decidedly against any relaxation of the rules as to 3 years.

The degree of knowledge required of an Indian student must of necessity be more than even the knowledge that is required in England or in the Colonies. The Indian Judge made law as well as Statute Law is based on English Common Law and Equity. It is too much to expect an Indian student to have the required knowledge of Indian codes without a comprehensive and accurate knowledge of English Law. At the same time no amount of study of English Law could be a substitute for the study of the positive law in this country. The student has necessarily to acquaint himself with "the chief contributions of the ever active Legislatures Imperial as well as Provincial to the Statute Book in the domain of Civil, Criminal and Revenue Codes." Added to all this, the student is expected to master at least the essential principles of the personal law, of the Hindus and of the Mussalmans.

There is another important plea that could be urged in support of a three year course. The University degree in this country is a direct passport to the profession. It is only right that a student before beginning the practice of the law must at least be acquainted with the essential principles of procedure. Even in regard to students who intend qualifying themselves as High Court Vakils it is inadvisable that during the period a student is expected to learn practical work in lawyers' chambers, he should be permitted to divert his attention by devoting his time to preparation for an examination.

With special reference to a good number of these considerations, the Sadler's commission state "that a course so complex and so varied cannot be satisfactorily comprehended by the average student even in his outlines in less than 3 years. We must further remember that owing to the great expansion of the law in recent times and the increasingly insistent demand from the laity for a higher degree of professional efficiency the length of the law course if not extended should at any rate not be curtailed."

I might be permitted to add that in the near future the University and the Law College must be in a position to equip at least some of its students with a fair knowledge of public law comprising constitutional law, comparative jurisprudence, and administrative law with a view to enable them to undertake the arduous public duties which lie before them. And legal education may have to be re-organized to suit the new requirements.

II. Method of Legal Study.

The method to be adopted necessarily depends upon the idea underlying a particular system of education. The German would insist upon the student having an encyclopædic knowledge of the Law and upon even the beginner being epuipped with an apparatus of epitomised knowledge of the whole field of law. The Anglo-American Eductional reformer would insist upon developing a certain habit of mind rather than imparting a lot of information to the student. No educational system at the present day can afford to devote its attention exclusively to either the German principle or the Anglo-American principle. A combination is inevitable and a mixed ideal must necessarily be adopted. The vital defect of the present system is that it gives very little scope to independent thinking in the student and that it does not bring out the best talent in the class-room. It is not possible to dispense with the lecture system altogether nor can it be asserted that it is an unmixed advantage to drop the system once for all. A proper lecture which is not merely a duplicate copy of the treatment in a text book may itself serve as a source of inspiration to the student. In some subjects like Romam Law, Real Property, Constitutional Law) lecture system may even be a necessity. But the lecture system by itself is not likely to yield very good results unless it is supplemented by or correlated to the case method of study already alluded to. The advantages of the case method of study are plain on the surface. It is sure to whet the intellect of the student, sharpen his power of debate and stimulate the love of contest which is the very essence of a lawyers's being. At the same time it is not that we are blind to the difficulties of adopting the case method in its entirety. In the first year of the student's course it is not likely to yield good results. It takes some time before the students get acquainted with legal expression, the methods of judicial or legal reasoning. And it may be cruel on the part of a professor to insist upon a student wading through an old English case extending through several pages for learning a simple principle of law established probably a century ago. Again, the success of the case-method of study depends upon the class being broken up into a number of groups under real, proper, tutorial guidance. Otherwise it may take up an unnecessarily long time and the discussion might drift into the hands of the one or two favoured few in the class-rooms. At the end of a long and learned discussion between the teacher and the taught the average student might find himself at sea as to what the law is. Again, it is not every subject that is capable of the case method of treatment. And even when it is adopted in any particular subject it has to be followed up by the expository method. I would advocate the case method in a study of the law of contracts, of torts and of Hindu Law to some extent and I would eschew it as much as possible in the teaching of Real property, of Procedure and similar subjects.

Again, the case-method of study may vary with the individual teacher. And the great results that are expected to result from the case method are not likely to ensue unless you have sufficient number of teachers who have had real practice at the bar selected only with reference to their efficiency. For a proper working of the application of this method the college as it stands is too unwieldy, the classes are too bulky and the staff is very thin.

In addition to adopting the case method of instruction it is desirable that moot courts should become a common feature of legal instruction. Leading members of the profession ought to be invited to be present and they ought to make it a point to respond to the invitation. The student should be required to submit essays periodically on short subjects prepared under the guidance of his teacher, and on receiving suggestions from him, it being a necessary condition that the exercises should be discussed in small classes.

The Sadler Commission attach great importance to this aspect of the students' legal training as in their view it is likely to promote a habit of accuracy and conciseness which is essential for a successful career in the profession.

III. *Curricula of Legal Studies.*

In regard to the curricula of legal studies there is not much to be said against the subjects prescribed for the F. L. and B. L. courses. I have only a few points to make against the present curricula of studies. Distinction is not made between the test that is to be adopted in regard to subjects which form the positive law in this country and to other subjects which are merely insisted on for the purpose of a legal training to the student and initiating him in the general principles. In a degree course we cannot legitimately advocate for the deletion of the Roman Law altogether. Roman Law has a claim upon every student of law, as the most systematised jurisprudence that the world has ever seen. At the same time there can be no doubt that Roman Law has to be studied from different points of view in the Continent where until recently it formed the positive law of the land and in countries permeated and influenced by English jurisprudence. In the latter countries it is enough if the student has a grasp of the principles of the law, and is in a position to see the bearing of Roman Law upon the growth of English equity. The curricula have to be revised so as to bring out what exactly is the degree and kind of knowledge required in Roman Law.

The second comment I have to make is that there is no provision made for students undergoing an optional course in certain important subjects, as comparative jurisprudence, legislation, administrative law and similar subjects. It is true that the examination aim of study is so much ingrained in the Indian Educational system that it may be difficult to induce many students to attend these optional classes. But a University or a college exists not merely for the average or ordinary type of student but also for the best student. The interests of higher education would be served if even a tenth part of the students of a class avail themselves of the optional classes. If it is not possible to introduce a regular course of lectures on such subjects it ought to be possible for the University or the College authorities to provide for lectures on special topics not coming within the regular college curricula with a view to promote an academic atmosphere.

Indian Constitutional law as at present taught and examined upon is not likely to prove an educational asset of great value in the future career of the student. The graduate in law is not likely to be any the better by merely getting up the Government of India Act for the time being in force or knowing the history of Mayor's Courts or of the Justices of the Peace or of the various changes in the constitution and powers of courts from time to time unless he is able to bring to bear upon a detailed study of the kind above referred to a general knowledge of constitutional law. It is much more important that the student should grasp the essential distinction between written and unwritten constitutions, the relative place of conventions in unwritten as distinguished from written constitutions, the feasibility of insisting a provision as to declaration of rights in written constitutions, the reconciliation between the growth of the legislative power and the principle of the judiciary sitting in arbitrament over the acts of the legislature, the legal consistency between the undefined responsibility of a member of the cabinet and the statutory powers of the Secretary of State for India, than that a lot of ill-digested information should be forced down the throat of the student. I would rather have constitutional law relegated to the rank of an opitional subject than have a compulsory examination in Indian constitutional law consisting merely of Ilbert's treatise and Cowell's uninteresting book on Courts and legislatures in British India. The student is likely to have much better knowledge by a rapid non-detailed study of such books as Dicey, Anson, Keith and the various constitutional enactments relating to British India and the Colonies. For the University imparting a proper instruction in constitutional law, I would advocate a separate chair of constitutional law under the auspices of the University presided over by eminent men in India, or even from England or elsewhere who have a thorough knowledge of political science. If we had a chair like this we should have had much more light thrown on many of the topics which came up for discussion during the recent constitutional changes.

I have already attended to the necessity of procedure being a subject of study in the law course.

Under existing conditions in this Presidency very little attention is being paid to the postgraduate study in law. I should like this Conference taking up the question of instituting a chair like the Tagore law professorship in Calcutta. There can be no gainsaying the fact that the Tagore law professorship has contributed to the growth of much indigenous legal literature and some of the Tagore law lectures have assumed the rank of classics. I trust that public spirit and philanthropy would not be wanting in this Presidency to stimulate the growth of a scientific study of the law by instituting a professorship of the Tagore law kind.

I have only to refer to the curricula of studies for the M. L. Degree. It is only fair to expect an M. L. Candidate to be something like a special in the subject in which he takes the degree of the Master of Laws. This expectation is not realised in a great many instances owing to the student being required to master too many subjects. How do you expect a student preparing Branch III or Branch II of the subjects for the M. L. Degree examinations to acquire a thoroughness in the various subjects which go to make these two branches respectively in the present state of things. You have only to look at the Calendar and you stand amazed how it could be legitimately expected that even the most brilliant student could really master the various subjects comprising these branches. I would give an option to the the student even in the sub-groups which each of these branches comprises and insist upon a more extensive study of the few subjects that he reads. I would not of course give him any option either with regard to the general law of property or with regard to the general law of contracts. The student cannot be expected to be well equipped in these subjects unless he has the real tutorial guidance of the best men in the field. Steps ought to be taken to secure such guidance either from the ranks of the professors or from the best men in the profession. In the examination the student should be permitted to use reference books if possible at least in certain subjects and there is no reason why a thesis should not be insisted upon in some subject connected with the branch for which the student is preparing himself. It is not necessary that the thesis should be an original production, it is enough if the student is able to compose an essay based upon a study of leading treatises and cases with some little originality in plan and in execution.

The reforms above advocated could with any success be attempted only by the strengthening of the staff and re-organization of the college. In regard to certain departments of study emphasis has to be laid upon the recruitment to the staff being from the members of the profession who have had active practice at the bar or are in active practice; in other departments recruitment has necessarily to be from among those imbued with a theoretic interest in law and devoting themselves to a wide study of it. A very large number of tutors and assistant professors has to be added to the strength of the college if the case-system of study is to be insisted upon.

The profession must be in a position to choose its own representative on the law college Council and when the general re-organisation of the Senate takes place effective means are to be adopted to secure the representation of professional interest for the purpose of regulating the law studies.

I would urge upon my friends not to view the measures suggested as the Utopian scheme of a dreamer but in a sympathetic and a kindly spirit with a view to give practical effect to them.

The true issue before the Country is "Is law to be merely a trade, or is it a noble calling destined to serve the larger interests of the country." I have no doubt as to what your answer will be.

A. KRISHNASWAMI AIYAR,
Vakil, High Court.

SUMMARY OF ENGLISH CASES.

M'Alinden *v.* James Nimmo and Co. Ltd., (1920) A. C. 39.

Practice—Costs—Pauper appellant—House of Lords—Scotch appeals.

The rule as to taxation of the costs of a successful pauper-appellant in the House of Lords, is that the fees of counsel are disallowed and the solicitors costs are limited to costs out of pocket, with a reasonable allowance for office expenses. The same rule applies to Scotch appeals.

Stubbs Ld. *v.* Mazure : (1920) A. C. 66.

Defamation—Libel—Imputation affecting credit—List of decrees in absence—Publication of, in a trade newspaper—Erroneous entry—Innuendo—Relevancy of.

The defendant published a commercial newspaper containing information as to the credit of traders and in a certain issue of the newspaper, the plaintiff's name had erroneously appeared in the weekly list of persons against whom decrees in absence had been obtained in the Court of Small Causes. The fact was that plaintiff had settled the claim out of Court. At the top of the list was a note to the effect that the publication of the decree did not imply inability to pay on the part of the individuals named or anything more than the fact that the entry appeared in the Court Books. The plaintiff averred by way of innuendo that the entry in question falsely and calumniously represented to the public that he was given to or had begun to refuse or delay to make payment of his debts, and that he was not a person to whom credit should be given. *Held* by the majority of the Lords (Lord Wrenbury dissenting,) that the entry was capable of bearing the meaning attributed to it by the innuendo, and that the prefatory note afforded no defence to the action.

Stubbs Ltd. v. *Russsel*. (1913) A. C. 386 distinguisheded.

London and North-Western Ry. Co.. *v.* J. P. Ashton and Co., (1920) A. C. 84.

Carrier—Transit of goods partly by land and partly by sea—Value and nature of goods not declared—Loss—Exemption from liability—Onus of proof—Carriers Act, 1830 S. 1.

Plaintiff delivered three packages of fur, each of the value of over 10£, to the defendant Railway Co., for carriage from London to Belfast. Plaintiff omitted to make a declaration as to the nature and value of the goods, as required by S. 1 of the Carriers Act, 1830. The goods were lost in transit but there was no evidence as to when or where they were lost. In an action by plaintiff for the value or the goods, the defendants relied on S. 1 of the Carriers Act as a defence. *Held* that the Carriers Act did not protect the defendants from liability. The Act affords protection to the carrier only when the goods are lost by land and in the present case the defendant did not discharge the burden, which lay on him, of proving, that the goods were lost during the land portion of the transit.

William Alexander & Sons v. Aktieselskabet Dampskibet Hansa and others : (1920) A. C. 88.

Shipping—Charterparty—Demurrage—Liability of charterer—Fixed rate of discharge—Delay due to shortage of labour.

If a charterer has agreed to load or unload within a fixed period of time, he is answerable for the non-performance of that agreement, whatever the nature of the impediments, unless they are covered by the exceptions in the charterparty or arise through the fault of the ship-owner or those for whom he is responsible. This rule applies to a case where the time is to be ascertained by reference to the rate of discharge. A charterparty provided that the cargo was to be loaded and discharged at the rate of not less than 100 standards per day, whether berth available or not, "always provided the steamer can load and discharge at this rate," and there was a provision for demurrage at 70 £ per day in the event of the steamer being detained beyond the time stipulated as above. The ship arrived at a port but owing to shortage of labour, the discharge occupied seven days more than the stipulated period. *Held* that the charterer was liable for the demurrage, as the proviso in the charterparty had reference to the structural capacity and equipment of the ship and did not apply to a shortage of labour.

Wilson v. United Counties Bank Ltd., : (1920) A. C. 102.

Bankruptcy—Trading customer—Right to damages for injury to credit and reputation—Right of action if vests in trustee.

A trader is entitled to recover substantial damages for injury to his credit and reputation, caused by the negligence of his bankers, without proof of special damage. The right to claim such damages does not pass to the trustee in bankruptcy but remains in the trader, after his adjudication as bankrupt.

JOTTINGS AND CUTTINGS.

The Nestor of the Law :—Lord Halsbury, whose remarkable mental and physical powers in a lusty old age have long been the pride of the profession, completed last Sunday his Seventieth year as a member of the Bar, and Lord Birkenhead who was but a boy of twelve when Lord Halsbury began his first period of office as LordChancellor in 1885 has felicitously expressed the sincere feeling of the Bench and Bar of England in sending him an affectionate greeting on so noteworthy an anniversary aptly applying to him Homer's tribute to Nestor: 'Two generations of mortal men already had he seen perish, that had been of old time born and nurtured with him in goodly Pylos, and he was king amongst the third'. Longevity is commonly supposed to be the special portion of lawyers, and both branches of the profession have produced their centenarians. But Lord Halsbury is the only English lawyer of acknowledged eminence who has been able to look upon seventy years of professional life. It is however, a privilege which, in the bounty of Nature, will belong to Lord Lindley later in the present year. The great judicial qualities which Lord Halsbury has displayed as a Judge, to which at different times striking tributes have been paid by the most experienced members of the Bar, will insure for him a distinguished place in the records of the Woolsack. The whole profession, rejoicing in the unabated force he continues to exhibit, cordially hope that Lord Halsbury, who is now in his 97th year, will make yet another contribution to those records by adding a centenarian to them. *The Law Journal.*

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Is Super-Tax Income Tax?—It is perhaps singular that this question should ever have been raised. S. 66 (1) of the Finance Act (1909-10) enacts as follows: "In addition to the income tax charged at the rate of one shilling and two pence under this Act there shall be charged, levied, and paid, for the year begining on the 6th day of April 1909, in respect of the income of any individual, the total of which from all sources exceeds £ 5,000, *an additional duty of income-tax* (in this Act referred to as a "super tax") at the rate of six pence for every pound of the amount by which the total income exceeds £ 3,000," and sub-sect. 2 lays down rules for the collection of the new tax.

Mr. Redman in the ninth edition of that very usefull work, Pratt and Redman's Income Tax Laws, makes the following observations : "The super-tax is a somewhat crude excrescence upon income-tax for the levying of which the dread of penalties is mainly relied upon. It is described in the statute as 'an additional duty of income tax,' but its actual nature is a matter about which the courts have not been unanimous." In *Hill* v. *Inland revenue Commissioners*(1912, S.C. 1246)Lord Johnston at the end of his judgment said : " that super-tax and everything connected with it is something quite apart from the income-tax is, if it were necessary, clearly shown by the four special rules which are appended to sub-sect 2, which I have just examined." The principal rule to which his Lordship referred is the one requiring that a new return should be made, embodying every item of income, whether falling under Schedules. B.C,D and E, and whether the tax has been assessed, or has been deducted at the source. The learned Judge thought that such return was not to be merely a combination of previous returns, because no such returns would show what is taxed at the source. The English courts however, took a different view. In *Bowles* v. *Attorney-General* (105 L. T. Rep. 870 ; (1912) 1 ch. 135) Mr. Justice Parker (as he then was) in the course of his judgment said: " We have therefore the following facts. The super-tax is in fact an income-tax. It is referred to in the Act which imposes it as an additional duty of income-tax ; it is collected and recovered by means (with some special and additional provisions) of the ordinary income tax machinery. It is intended, like the ordinary income tax to be a permanent tax, though imposed annually only. It is imposed and its collection regulated, by Sections contained in a part of the Act which is entitled ' Income Tax' and is to be read with all existing enactments relating to the income-tax, including S. 30 of the Customs and Inland Revenue Act 1890. Under these circumstances can there be any real doubt that it is a duty of income-tax within the meaning of the thirtieth Section of the last-mentioned Act ? In my opinion there cannot." The said S. 30 merely extended the provisions of the Income Tax Act to the duties to be granted for a succeeding year, so as to insure their collection in due time, In *Duke of Beaufort Commissioners of*

Inland Revenue (108 L. T. Rep. 902 ; (1913) 3 K. B. 48) super-tax was treated as income-tax by the Court of Appeal. is It submitted, therefore, that the language of Lord Johnston was too sweeping, and the super-tax is an income-tax, though as pointed out by Mr. Redman in the aforesaid work, it cannot be levied at the source.

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Mr. Justice Darling and the Jesuits. For so clever a man Mr. Justice Darling makes some very strange mistakes as Judge, His latest utterance of a non-judicial character has. brought him into collision with the Catholic Union. In the course of a case tried by him on January 27th (*Smith* v. *Taylor and Hansell*) the plaintiff who admitted he had been convicted of perjury, attempted to justify his conduct in dealing with certain property in a manner that induced the judge to accuse him of having played 'an unworthy trick'. Then followed this dialogue. Mr. Justice Darling : Are you a Jesuit ? The plaintiff, No, my lord. Mr. Justice Darling, You surprise me.' Nobody will be surprised to learn that the Catholic Union, Jealous of the honour of the Society of Jesus resented what they regarded as 'a gratuitous insult' to their community. The learned Judge's conduct in dealing with the witness was sufficiently open to comment ; his reply to the protest made by the Catholic Union may be regarded as still more unfortunate. Not content with explaining that when he required of the discredited witness whether he was a Jesuit he merely intended to suggest that his behavour was jesuitical in the popular sense. Mr. Justice Darling deemed it becoming to enter upon discussion of the principles and conduct of the Jesuits in much the same spirit, if hardly with the same learning as Kingsley entered upon his famous and unfortunate controversy with Newman. With the criticism which Mr. Justice Darling has seen fit to pass upon the Jesuits we have no more concern than with the merits of the case which gave rise to his explanatory letter. What does concern every lawyer is the prestige of the Bench. That prestige is always endangered when Judges indulge in non-judicial remarks, and still more is it imperilled when, seeking to justify them, they enter upon controversial matters which have not the slightest connection with their office. The Law Journal.

CONTEMPORARY LEGAL LITERATURE.

The Journal of Comparative Legislation and International Law for January 1920, has an interesting article offering a suggestion to the growth of English law by removing what is considered to be a defect in it. There is a present need for adoption in England, because firstly, there are a large number of fatherless childern unprovided for, who might find some compensation for the loss of a father's care if a relative or some suitable stranger adopted them, gave them a home and provided for their education, and started them in life. Secondly, there are many homes now desolate by the loss of sons where the father and mother of those who are gone might find consolation by taking into their care helping, training, and providing for some child or children whom they come to regard with growing affection almost as their own offspring. Thirdly, owing to the terrible mortality of young men there are now and will for sometime be an increased number of women who will never be able to marry and of childess widows who have lost their husbands in the war. They have a maternal instinct which cannot be satisfied now by their having children of their own, and this feeling might find some partial satisfaction, and scope for women's highest work might be given, if they could adopt some child for whom such motherly care would otherwise be lacking. Private arrangements might of course be made but some more definite legal recognition is required both to safe-guard the interests of the childern on the one hand, and on the other to secure that those who have in fact brought them up, should not be deprived of them except for some good reason affecting the welfare of the children. These considerations apply most clearly in the case of those who are fairly well-to-do; but the importance of the recognising adoption by law is felt, not only in cases where the adoptive parents are able to maintain and provide for adopted children until they grow up, but also among the working classes. There are manufacturing districts where it is not uncommon for relatives or neighbours to take into their families children who are neglected by their parents. Such children are cared for and maintained by those who have kindly saved them from their parents, who have ill-treated and deserted them, till the age of twelve or fourteeen when the children begin to earn in factories; and the parents then considering them to have a marketable value, have claimed to take them back simply to get the benefit of their wages. Then the various systems of law in which adoption obtains, are compared with special reference to the legal incidents of adoption. The Roman system, the French, and the German are considered, and Hindu Law in which adoption occupies such a prominent place with which we are so familiar, is also considered. Then the writer proposes certain amendments in English Law. He thinks that there are strong reasons in favour of establishing tribunals or appointing some officers or giving further jurisdiction to some existing tribunals to protect children. The same tribunal might deal with applications for sanction of agreements for adoption and also have power where it is proved that it would be for the benefit of a boy or girl to remain with those who have brought them up, to make an order preventing interference by the parents and for keeping them in the care of those who have adopted them. The necessary legal sanction to adopt must not involve much expense and the officer or judge should inquire into the case and the fact of adoption should be duly registered and a certificate should be given to the adoptive parents stating shortly the effect of the transaction and of the rights and duties conferred and imposed upon them by it. Lawyers in India need not be told that the subject of adoption is a difficult one giving rise to many questions and before its introduction they must be settled and some preliminary inquiry is necessary before the matter can receive the attention of Parliament.

Then follows an article headed, "Fair rent experiment in New South Wales". This subject is particularly instructive at this juncture as the various legislatures in India have in contemplation measures for fixing a fair rent for houses. The New South Wales Act of 1915, provides a definite scheme for the determination of the fair rent of a dwelling. The unimproved value of the land is first ascertained with the assistance of an expert Government land-valuer; then the Court next estimates the cost of erecting a similar dwelling house on the land at the time of the application, and deducts such fair and reasonable sum as may be allowed for depreciation of the actual dwelling. The capital value of the dwelling house is then obtained by adding the unimproved value of the land to that of the estimate of the cost of erecting a dwelling house ; and on this capital value interest is calculated at six and a half per cent, a rate not less than the current rate charged upon over-drafts by Commonwealth Bank of Australia, and not more than two and a half per cent above such rate. This margin of two and a half per cent is to be considered only in extraordinary circumstances. To this percentage of the capital value the following items are added in order to fix the fair rental. (1) The annual rates as levied by the Local Government, Water and Sewage authorities. (2) The annual taxes imposed by the state and Common-wealth on the land or the income derived therefrom. (3) The amouut estimated to be required annually for repairs including painting maintennce and renewal (4) The annual insurance on the buildings. (5) The amount esimated as annual depreciation in the value of the buildings where such depreciation is shown to have diminished their letting value. (6) The amount, if any, the Court may allow for the estimated time per year when the dwelling house is untenanted. The Act then goes on to make a very importent provision which seriously qualifies the above method of calculating the annual fair rent that excepting where circumstances which render an increase equitable are proved to the satisfaction of the Court, the fair rent shall not exceed the rent at which the dwelling is let on the 1st of January 1915, when the rent was very high in New South Wales. And the writer concludes with the opinion that the Act although acting as a restraint both to the speculative builder and to the cautious and timid investor has kept rents at a reasonable rate during an exceptionally difficult period, and acted as a valuable deterrent to the building profiteer.

BOOK REVIEW.

THE CIVIL COURT MANUAL (ANNOTATED) IMPÊRIAL ACTS VOL (1) by Messrs. P. Ramanatha Iyer & Raghava Iyer.

This is the most fully annotated edition of the Indian Codes in a civil court manual, that we have come across. Since the publication of the last edition of Sanjiva Row's All India

Civil Court manual there was a need felt in some quarters for a work of this kind. The fullness of the annotations entitles the present work to a place almost equal to the publications of the several acts with commentaries. The various High Courts and Chief Courts have in many cases framed elaborate rules under the rule making power confered upon them by the new Civil Procedure Code. These rules are given in their appropriate places in the Code. The legislative changes in the various enactments are noticed in their proper places, and will be found to be of great use to the practitioners for comparing the present state of the law with the previous provisions. We heartily commend this publication to the profession and the public at large.

PRINCIPLES OF MAHOMMADAN LAW. *by Faiz. B. Tyabji, 2nd Edition, 1920: Messrs. Butterworth & Co., Rs. 21.*

We have great pleasure in announcing the publication of the Second Edition of this already. Mr. Tyabji's Mahommadan Law has taken in the lawyer's library its deserved place by the side of Amir Ali's well known treatise on Mahommadan Law and the other high authorities on the subject. When the first Edition of this work was published it was reviewed in the pages of our Journal in 24 M. L. J. (Journal) page 190 by the pen of an eminent Jurist. In this Edition the cases have been brought up to date ; in many places sections which give several rules of law intimately connected in a single section, have been cut up into a number of sections each clearly bringing out one important rule of law. The work has fulfilled the expectations raised in our minds about its usefulness to the Bench and the Bar and we have no hestiation in commending it to students, lawyers and judges alike.

The Madras Law Journal.

PART XVII.] APRIL, 1920. [VOL. XXXVIII.

SOME SUGGESTIONS AS TO REDUCTION OF COURT FEES.

No institution fee was payable in the Supreme Court or under the original system of Lord Cornwallis. The State defrayed the expense of judicial establishments from the general revenues. Institution fee was for the first time levied by Bengal Regulation XXXVIII of 1795, not however as a source of revenue but merley for the purpose of preventing vexatious litigation. Bengal Regulation VI of 1797 which converted the institution fee into stamp duties stated that increase of revenue also was one of its objects. The first general Court-fees Act was Act XXXVI of 1860. The scale of fees under that Act was low. and the amount realised in court-fees was not adequate to meet the expenditure on courts. A commission was appointed in 1867 by Lord Lawrence to suggest a revised scale of fees to meet the proposed increase in the salaries of judicial officers. The result was the presant Court Fees Act. In the Council Mr. Maine disclaimed all intention on the part of the Government to tax litigants as a separate class for the benefit of the general finances of the country. But matters have changed very considerably since and judging from the latest figures the State seems to be realizing a yearly surplus of over 19 lakhs in this Presidency alone. The total income on this head for the year in 1918 is shown as Rs. 10,917,236 and expenditure on judicial establishments as Rs. 8,951,713. In 1896 the income was Rs. 5,840,100 and the expenditure Rs. 4,692,099 and thus it will be noticed that the surplus has been steadily on the increase.

This state of things may be usefully contrasted with that obtaining in England whth a deficit of £300,000 as the latest figures show. The litigants in England do not seem to pay anything distantly as heavy fees as those in India. They have no graduated institution fee. They have to pay ten shillings for sealing an ordinary writ, £ 1 for a mandamus or a special case and £ 1 for setting down a case or appeal for hearing. No doubt, they have to pay extra for examination of witnesses &c., but all that cannot come up to the heavy institution fee here. Administration of justice is one of the primary functions of State, a return for the tax that is levied from the subject as the Hindu Law giver would put it and should not be taxed for whatever purpose except in the last resort. Nor is it good policy so to tax. Owing to the costliness of civil litigation parties so often resort to what they consider the cheaper expedient of criminal courts with what disastrous results one knows. In the smaller sort of litigation where the prospect of realizing the amount of the decree is remote, the court-fee is a positive incentive to high handed action against the debtor. Vexatious litigation should no doubt be checked. This is in accordance with hoary precedents in India and there is nothing wrong in the State levying a heavy fee in litigation pronounced to be vexatious by the court but an honest litigant in doubt should not be deterred by the heavy court-fees from resorting to Courts. We do not regard resort to litigation as necessarily indicative of a deseased or deranged frame of mind. There is an amount of dishonest litigation in this country undoubtedly but equally undoubtedly there is a very large mass of litigation where the litigants are honestly in doubt and the Courts equally so. In how many cases appeals do not succeed on pure questions of law and in how many more cases of mixed questions of law and fact with the best of intentions and all parties telling the truth it is not possible to come to differing conclusions. Mr. Maine ostentatiously said in Council that the Indians clinging so tenaciously to their usages could not point to Bentham as supporting them against the institution of court-fees as most of the litigation was due to the indeterminate nature of their usages. This observation was at no time absolutely right for Indians had never more than a fraction of their usages (only those relating to marriage, inheritance and succession) reserved to them but on the other hand witness the result of codification or clear enunciation of law by statute which was considered a panacea for all evils by Mr. Maine. If you analyse the reports you find that the bulk of the protracted litigation in Madras, centres round Civil Procedure, Limitation Act, Madras Estates Land Act, Contract Act, Insolvency Act and the other numerous Acts devised by the Indian legislature. With complex systems of laws which are the necessary accompaniment of civilisation, there must be a large margin for doubt in their interpretation giving rise to honest litigation and the State should not charge the same amount of court-fee from such honest litigants as in the case of patently dishonest litigants. There must, we think, be a discrimination in favour of honest litigants. Again the Court-fee levied must have some reference to the amount of judicial time taken up. Cases decided *ex parte*, compromised, withdrawn or referred to arbitration at an early stage should not be charged the same fee as contested suits. There should be a provision for refund of part of the fee in such cases. S. 73 of the Presidency Small Causes Courts Act recognizes this principle. Suit in respect of money claims on bonds and promissory notes and suits for rent on leases in writing do not take as much time as suits on mortgages and suits for possession and should be charged more lightly than them. Especially, there is no reason why the claims decided upon summarily in the Small Cause Courts should be charged on the same scale as regular suits. The Presidency Small Causes Courts Act seems to proceed on the assumption that the litigant must pay specially for speedy justice though administered in a hurry. There is no justification for the higher fee levied in the Presidency Small Cause Courts. We think there must be an equal treatment all round, whether it is levelling up or levelling down. Historical accidents should not be allowed to stand in the way of equal treatment. The maximum fixed in the Court Fees Act is too high; a thousand five hundred should be the highest fee allowed. One thousand is considered quite sufficient fee for a Vakil, however valuable and complicated the litigation he is engaged in, might be. The Court has a larger number to strike an average from and a maximum court-fee of 1,500 should quite suffice. There is no difference necessarily between the time taken on a litigation worth 50,000 and one involving 4 lacs or more. Now that court-fee has the complexion of a tax, we think the poorer classess of litigants ought to pay a lower fee than the richer. It is out of the question that the Courts should be made to embark on an enquiry as to the wealth of the litigants. The Legislature has to proceed largely on a *priori* or *prima facie* considerations. The smaller kind of litigation may be taken generally as affecting the poorer classes and must be taxed more lightly than the higher litigation. The Court-fee falls heavily on the poorer classes. It is an engine of oppression in the hands of the rich who can penalise the poor defendant in the costs of litigation. It is equally a hardship on the honest but poor plaintiff that he has to make an additional venture from his slender resources against the contingency of a recovery from the defendant. The fee ought to be in money claims up to Rs. 300 of a Small Cause nature, 3 per cent. above that up to Rs. 500, 4 per cent. from 500 to 1,000, 5 per cent. and after that 7½ per cent. with a reserve of power in the court to levy the higher fee of 7½ per cent. from dishonest party plaintiff or the defendant as the case may be. We would also suggest a discrimination in favour of some other kinds of suits. The court-fee charged in maintenance suits is too heavy. It affects that unfortunate section of the Hindu community, the widows. A fixed fee of Rs. 10 should be levied in all cases, but the defendant may be made to pay an *ad valorem* fee on the amount found due. The law as it stands at present no doubt acts as a check on vexatious litigation but it acts much more as a powerful ally to inhuman members of the family in resisting reasonable settlement. Court Fee leviable in suits relating to charities, religious and secular also needs revision. The Court-fee heavily handicaps the institution of this class of suits which in the present condition of the religious and charitable institutions of the country deserve special engourgement. Now that S. 92 of the Code of Civil Procedure has been amended so as to require the sanction of the Advocate-General in the more important classes of suits relating to charities, we have enough gurantee against vexatious litigation and a rule might very properly be made that a fixed fee of Rs. 10 should be leviable in suits coming within S. 92 of the Code of Civil Procedure or S. 14 of the Religious Endowments Act and also suits for the recovery of possession of property from ex-trustees or from alienees from trustees for the charity. In suits to remove a trustee or for a scheme the Court-Fee would no doubt even now be Rs. 10. But if other reliefs are claimed an *ad valorem* fee is required. The Allahabad and the Calcutta Courts take a more liberal view as to these than the Madras High Court *Ram Rup Das*[1] *Thakuri Brahmanarayanan*[2] *Girdhari Lal* v. *Ram Lal*[3] *Ghazaffar Husain* v. *Yawar Husain*[4] *Srinivasa* v. *Venkata*[5].

As regards appeal we would suggest a larger system of refund that is to say whenever an appeal succeeds and the court is of opinion that the case is one of honest difference of opinion it should have a discretion to order a refund. We would make it discretionary so as to exclude all cases of vexatious claims. We would otherwise retain the present scale of fees for the Appellate Court as appeals are to a large extent luxury and the parties should pay for it when they want to have it.

The suggestions that we would make, thus are (i) that on money claims upon bonds and other instruments, the fee up to Rs. 300 shall be only 3%, from 300 to 500 4% and from 500 to 1,000, 5% but that the Court should have power to direct a vexatious or dishonest litigant to pay a higher court fee, if the claim or defence is vexatious or dishonest.

(2) In all suits compromised, withdrawn, referred to arbitration, or decided *ex parte* at an early stage, there shall be a refund of half the court fee.

(3) There shall be a uniform rule as to court fees both in the Presidency town and the mufassal.

(4) There shall be a fixed fee of Rs. 10 in suits relating to charities that fall within S. 92 of the Code of Civil Procedure and S. 14 of the Religious Endowments Act and suits for maintenance and also suits for the restoration of charity properties to the trust brought by trustees or by persons interested in the trust as against ex-trustees or alienees from trustees.

(5) Whenever an appeal succeeds, it shall be in the discretion of the Appellate Court to refund the Court-fee paid on appeal when it considers that the case was one of honest difference of opinion.

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[1] 12 Cal. L. J. 211.

[2] (1896) I. L. R. 19 All. 60.

[3] (1899) I. L R. 21 All. 200.

[4] (1905) I. L. R. 28 All. 112.

[5] I. L. R. 11 Mad. 148.

The First Indian Chief Justice.

We notice with great pleasure the appointment of Mr. Justice Shadi Lal as the permanent Chief Justice of the Punjab High Court. Mr. Montague and the Government of India must be congratulated on this first definite break with precedents which so often paralyse the action of even the most benevolent administrators. There was no statutory bar to the appointment of an Indian to the office of Chief Justice nor was there any lack of competent men. What was lacking was the will to appoint but now, thanks to the new angle of vision, changed conditions and Mr. Montague a departure has been made and we hope and sincerely trust that the claim of deserving Indians will not be ignored in future when similar occasions arise in other provinces.

The customary reading of the High Court and the Government of India Acts denies eligibility for this office to Vakils. Whatever may be said as to the wording of the proviso as it stood in the Indian High Courts Act, on the language of the Government of India Act, there seems to be little justification for such a view. The proviso as it stood originally ran thus: "Provided that not less than one-third of the Judges of such High Courts respectively including the Chief Justice shall be Barristers"; as re-enacted in Section 101 of the Government of India Act, it runs thus : "Provided that no less than one-third of the Judges of the High Court including the Chief Justice, but excluding the additional Judge". The construction that was fairly but not clearly open under the old Act that the third should be inclusive of the Chief Justice would seem to be excluded by the addition of the words " but excluding the additional Judges." Both the participal clauses in the proviso as it stands at present must be taken to qualify Judges and not one-third. The language of cl. (2) (ii) of the section confirms this view. That clause says that the maximum number of Judges of a High Court including the Chief Justice shall be twenty. Reading the two parts of the section together, it seems to be clear that the participial clauses in the proviso are intended to qualify Judges. Even under the old Act, the alternative construction was not the only or necessary construction. On the other hand, the language "not less than one-third of the Judges including the Chief Justice" would seem to be directed to make it clear that the Chief Justice is for the purposes of the proviso, a Judge as the opening part of the section makes a difference between the Chief Justice and the other Judges unlike the present section in which the words are: "Each High Court shall consist of a Chief Justice and as many other Judges." The object of the words in question in the proviso as it stands now would thus seem to be different from the object of the words in the old Act. In the old Act, the object was to include the Chief Justice among the Judges for the purpose of computation; the object of those words in the present Act is to exclude the additional Judges. As they had been included already in the section in the total strength of the High Court for the purpose of fixing the maximum strength there was the necessity to specially exclude them if their number was not intended to be taken into account in fixing the proportion for the barrister and civilian elements.

It is not in the interests of public service that the field of choice should be restricted and the propriety of admitting the vakils' claim to equal treatment with the other sections of the bar has been recognised even by the Joint Committee of the Parliament. If there is any doubt on the section, justice requires that the matter should be made clear so as not to exclude a prominent section of the bar in India which has justified by its past history its claim to full recognition.

SUMMARY OF ENGLISH CASES.

Johnson *v.* Taylor Bros. Co., Ltd: (1920) A. C. 144.

Practice—Writ—Service out of jurisdiction—Sale of goods—C. I. F. Contract—Failure to ship goods or to tender documents—Cause of action—Rules of the Supreme Court, O. 11 R. 1 (e).

On an application for leave under O. 11 R. 1 (c) of the Supreme Court Rules by a purchaser of goods on C. I. F. terms from a foreign vendor, to serve notice of a writ of summons on the vendor outside the jurisdiction in an action for breach of contract, it was found that the substantial breach on which the action was founded, was the failure to ship the goods at the foreign port. The purchaser alleged that the breach was the failure to tender shipping documents in England and claimed leave. *Held* that leave could not granted.

Per *Lord Atkinson* :—Where a purchaser of goods in England enters into a C. I. F. contract with a foreign vendor, the vendor in the absence of any special provision to the contrary, is bound to do the following things :—First to make out an invoice of the goods sold. Second, to ship at the port of shipment goods of the description contained in the contract. Third, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. Fourth, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of buyer. Fifthly, with all reasonable despatch to send forward and tender to the buyer these shipping documents *viz.*, the invoice, bill of lading and policy of insurance, delivery of which to the buyer is symbolical of delivery of the goods purchased placing the same at the buyer's risk and entitling the seller to payment of their price. If no place be named in the C. I. F. contract for tender of the shipping documents they must *prima facie* be tendered at the residence or place of business of the buyer.

Heyworth Manufacturing Co. Ltd *v.* Ryott. (1920) 1 Ch. 1.

Contract—Restraint of trade—Film actor—Acting under pseudonym—Condition that pseudonym to be employer's property and should not be used by actor after leaving employment.—Breach—Injunction.

The plaintiffs, a firm of film produces employed the defendant as a film actor for a particular period. Under the contract of service the defendant was to act under a pseudonym which should be the sole property of plaintiffs and after the termination of the period of employment he was precluded from using the pseudonym for any purpose whatever and acting for new film makers unless and until plaintiffs agreed not to announce or advertise his performance under the pseudonym. Partly owing to his own ability and partly due to the plaintiffs' advertisements, the defendant acquired considerable reputation under the pseudonym in which his professional reputation became merged. It was found that the market value of the defendant without his pseudonym would be diminished considerably. The defendant entered the service of rival film producers under the pseudonym and the plaintiffs sued for an injunction restraining him from breaking the terms of the contract. *Held* that in the circumstances of the case, the contract was in partial restraint of trade and contained conditions which were not reasonably required for the protection of the employers and that therefore the Court would not enforce the contract.

In re **Campbell** : (1920) 1 Ch. 35.

Practice—Originating summons—Service out of Jurisdiction—Scotland—Supreme Court Rules, O. 11 R. 8 A.

There is no jurisdiction in an English Court to allow service of process out of the jurisdiction except by statutory enactment. The words "foreign country" in O. 11 R. 8 A. of the Rules of the Supreme Court mean the same as in R. 8 and neither rule applies to Scotland or any other part of the British Dominions.

Wheeler *v.* **Keeble Ltd.** (1920) 1 Ch. 67.

Landlord and tenant—Breach of covenant—Suit for recovery of possession—Interlocutory injunction—Costs.

A landlord sued his tenant for possession of the premises comprised in the lease, damages for breach of covenants and an interim injunction. He served a notice of motion for an injunction restraining the defendant from erecting or permitting to remain erected certain wooden structures then erected on the front of the premises in breach of the covenant contained in the lease. The breach of covenant was admitted but it had been remedied since the notice of motion was served. On a question arising as to the costs of the motion, *held* that the issue of the writ to recover possession was an unequivocal determination of the lease by the plaintiff, that it was not open to him to move for an injunction on the footing of a subsisting lease and the plaintiff must pay the costs of the motion.

In re **Anglo-Austrian Bank**: (1920) 1 Ch. 69.

Contract-war—Enemy business in England—German-Law-Applicability of.

A contract made in Germany for service with a German Company established in Great Britain but controlled and directed from Berlin, is a contract the Law of which is German and the rights of both parties under it are determinable by German Law. The war was by German Law and in Germany no effect on that contract and the rights of the parties continue to be regulated thereby.

Rex *v.* **Commissoner for Special Purposes of income Tax** (1920) 1. K. B. 26.

Income-Tax—Special Commissioners—Refusal to exempt subject Mandamus—Costs of application.

Under S. 105 of the Income Tax Act, 1842 an obligation is imposed upon the Commissioners for the special purpose of Income-Tax to allow exemption from income-tax in certain cases and to make an order for the repayment of duties which may have been paid, and if the Commissioners do not carry out those statutory duties the Court will issue a mandamus to compel them to do so at the instance of the subject who is entitled to exemption.

If the Court issues a mandamus commanding the special Commissioners to perform their statutory duties, the Court can direct them also to pay the costs of the application; the Common Law rule that the Crown neither receives nor pays costs does not apply to that case, since the Commissioners act not merely as servants of the Crown, but in the performance of their statutory duty.

Young *v.* **Ladies' Imperial Club** :—(1920) I. K. B. 81,

Club—Expulsion of member—Resolution—Validity—Constitution of Committee—Irregularity—Effect of.

The executive committee of a proprietary club acting under its rules removed the name of the plaintiff, a member from the list of members, on the ground that her conduct was injurious to the character and interests of the Club. The notice calling the meeting of the Committee stated that the object was "to report on and discuss the matter concerning (the plaintiff)" and it was sent to each Member of the Committee except one who had previously intimated that owing to frequent absences and various calls upon her time she would be unable to attend meetings of the Committee. In a suit by the plaintiff for a declaration that she was a member of the Club, for an injunction and damages.

Held, that the notice stated the object of the meetings with sufficient particularity; that the member of the Committee to whom notice was not sent, was in view of her intimation of inability to attend meetings, not a summonable member; and that the omission to send notice to her did not invalidate the proceedings of the Committee.

A Court will not grant an injunction where a person has been excluded from a proprietary club.

Where nothing has been done by a club contrary to natural justice, and where its rules have been substantially adhered to, the Court will not be so meticulous in scrutinising its acts in regard to formalities and technicalities as it will be in dealing with the proceedings of a business company.

Lyle—Samuel *v.* **Odhaws Ltd.,** (1920) I K. B. 135 C. A.

Practice—Discovery—Libel—Newspaper—Defence of fair comment—Names of informants—Disclosure of—Interrogatories special circumstances.

In an action for libel against the proprietors and publishers of a newspaper, who plead fair comment, it is not permissible in the absence of special circumstances to interrogate the defendants as to the sources of their information or as to the names of their informants.

Neither the fact that the plaintiff gave an undertaking not to sue the informants nor, in the circumstances of the case, the fact that the matter complained of was an attack on the private character of the plaintiff, constituted a "special circumstance" so as to take the caseout of the general rule.

Rex v. Marshal and Smeeth Ten District Commissioners: —(1920) I. K. B. 155.

Mandamus—Statutory body—Writ when issued.

If a power or discretion only, as distinct from a duty, exists then the prerogative writ of mandamus will not be issued by the Court. In considering whether a statutory body is invested with a duty as distinct from a mere power or discretion, it is essential to consider the provision of the enactment and to weigh its general scheme and its substantial object. The use of the word "may" as distinguished from the word "shall" is in no way conclusive.

Sidebottom v. Kershaw Leese & Co: (1920) 1 Ch. 154.

Company—Articles of association—Alteration of—Power to expel competing shareholders—Bona-fide alteration for the benefit of the Company—Companies Act, S. 13.

Under S. 13 of the Companies Act, a company has power to introduce into its altered articles any thing that might have been included in its original articles, provided that the alteration is made bona-fide for the benefit of the Company as a whole. A private trading company, in which the majority of the shares were held by the directors, passed a special resolution to alter its articles by introducing a power for the directors to require any shareholder who competed with the Company's business to transfer his shares, at their full values, to nominees of directors. The plaintiff, who carried on a rival business and held the minority of the shares voted against the resolution. *Held* that the resolution was passed bona-fide for the benefit of the company as a whole, and was therefore valid and enforceable by the majority against the minority.

Commissioners of Inland Revenue v. Marine Steam Turbine Co., Ltd. (1920) 1 K. B. 193.

Income-Tax—Excess profits duty—Profits of "business"—Right to receive royalties.

A Company acquired the right to manufacture a newly-invented machine from the inventor and patentee thereof, and exercised the right for some time. Subsequently the Company went into voluntary liquidation and the liquidators transferred all the rights of the Company to a new Company in consideration of a sum in cash, certain shares in the new company, and a royalty for a term of years on every machine manufactured and sold by the new Company. The liquidation of the old Company having been stayed by the Court, the old Company received the royalties and after paying certain sums to the inventor and patentee distributed the balance among its shareholders. The Crown sought to assess the Company to excess profits duty in respect of the royalties. *Held* that the old Company in receiving the royalties was not receiving the profits of any "trade or business" carried on by it within the meaning of S. 38 of the Finance Act and that it was not liable to be assessed to excess profits duty in respect of the royalties.

The King *v.* **Biggin :** (1920) 1 K. B. 213 C. A.

Evidence—Criminal trial—Murder—Defence involving imputations on character of deceased man—Cross-examination of prisoner as to other offences—Admissibility of evidence—Criminal Evidences Act, 1898, S. 1 *(b).*

On the trial of a person for murder, the defence, was that the act had been done in self-defence, the injured man having made improper overtures to the accused and on these being rejected had violently assaulted him. No questions had been asked or evidence given, to show that the accused had a good character. But in the cross-examination of the accused questions were put which had no relevance to the charge of murder but which tended to show that the appellant had previously committed other offences. The questions were objected to, but allowed by the trial Judge on the ground that the dead man was the prosecutor and the defence involved an imputation on his character; and secondly because they tended to show that the appellant did not always speak the truth. The accused was convicted of murder and appealed. *Held* that the questions put to the appellant in cross-examination were inadmissible and the conviction should be quashed. The deceased man was not a prosecutor within the meaning of S. 1 (b) of the Criminal Evidence Act, 1898, and the questions were not admissible on the ground that the defence involved an imputation on the character of the prosecutor. Nor were they admissible to prove that the appellant did not always speak the truth.

Rex v. Faroborough Urban Council: (1920) 1 K. B. 234.

Local authority — Licensing of Omnibuses — Refusal to grant license—Mandamus.

If the Court comes to the conclusion that a local authority has refused to exercise its statutory power of granting licences to omnibus holders, by taking extraneous matters into account and allowing itself to be influenced by them, it is the duty of the Court to intervene bp a mandamus.

JOTTINGS AND CUTTINGS.

Ireland and the Defence of the Realm. Internment of suspects without trial or allegation of offence, which was one of the most drastic and at the same time one of the most questionable of the powers assumed by the Executive under the Defence of the Realm Acts during the war, has been continued as regards Ireland, though it has ceased to be operative in other parts of the United Kingdom by the dropping of the objectionable Regulation 14 B. The system of *letters de cachet* which was created under cover of this Regulation, and put in force against British citizens and aliens alike, was excused by the emergency of the war, but the breach of principle which this departure involved had another and more disastrous consequence the abandonment by the Judges of their traditional role as protectors of the liberty of the subject against the Crown. The notorious Judgment in *Rex v. Halliday* (1916-17) in which the abandonment of jurisdiction over the arbitrary acts of the Executive was openly proclaimed, set up a new and vicious principle, namely that so long as the Defence of the Realm Acts stood on the statute book every act of the private citizen, freedom of movement, freedom of opinion, freedom of contract, was liable to be controlled by a D. O. R. A. regulation in other words that as Lord Shaw of Dunfermline trenchantly put it we might be 'regulated' out of our liberties. Our own and others' protests against this lowering of the judicial function and status were unavailing to prevent the setting up of a bad precedent, and now this precedent is being used to maintain the same attitude of judicial incompetence to deal with the condition of things which has arisen out of Irish politics.—*Law Journal.*

The case of Patrick Foy.—A King's Bench Divisional Court, consisting of the Lord Chief Justice and Justices Bray and Avory, has now rejected an application for a writ of *habeas corpus* directed to the Governor of Wormwood Scrubbs Prison on behalf of a Dublin shop assistant who had been summarily arrested on an order of the Chief Secretary and deported to England. No charge was made against him, and there were no proceedings in any Court of law, but the order, which was made under Regulation 14B, directed that he should be interned in prison at Wormwood Scrubbs and should remain there until further orders (*Rex* v. *Governor of Wormood Scrubbs Prison*; *Ex Parte Foy*; March 19). The contention for the interned man was that this exceptional machinery and the suspension, by Proclamation of trial by Jury in Ireland under the Defence of the Realm (Amendment) Act, 1915 S. 1 (7) had no application to the present conditions in that country and that the suspension of Civil liberties could only validily continue and operate so long as the special military emergency arising out of the late war, on which the Proclamation was founded, continued to exist. There might be, as there no doubt are other dangers to the public safety in the Sister Isle, but the particular danger of invasion by a foreign foe contemplated by the Defence of the Realm Acts had ceased to exist, and so the regulation had no longer any justification. The answer of the Crown was that the war had not ended; there had been neither revocation nor new legislation so far as Ireland was concerned; and the Court had no power to interfere by issuing a writ of *habeas corpus*. This final argument was conclusive for the Court. The Lord Chief Justice was insistent in his judgment on the sacred duty which the Court had to discharge—a duty no less than the preservation of the personal liberty of the subject. And he added that even in this case they would have carefully dealt with the facts had not the Legislature thought it right to take from us the right to do so. We know of no provision of the Defence of the Realm Acts, or of any other statute, which in terms takes away this right ; it is a judicial determination alone which has led to its abandonment. That abandonment is fraught with danger to the Commonwealth and we shall not stand alone in continuing to protest against it.—*The Law Journal.*

The Making of Laws.—Sir Mackenzie Chalmers, who explained to the Law Society's students on Monday how Acts of Parliament are drafted and passed, pointed out how Bills prepared by skilled Parliamentary draftsmen are often marred and muddled by ill-drawn amendments adopted by legislators in a hurry. 'A Bill' as he picturesquely put it goes into Committee like a nicely-dressed young lady entering a meadow; it comes out like the same young lady after she has been chased by an angry bull, and has struggled through a quickset hedge to escape him.' The object of his interesting address being explanatory, Sir Mackenzie Chalmers who is himself an experienced Parliamentary counsel, did not suggest a remedy for this haphazard method of legislation. Had he deemed it within his province he might have informed his audience in the law Society's Hall that the Law Society itself has dealt with the matter. At the Oxford Meeting of the Society in 1901, at which Lord Wolverhampton, in his presidential address, criticised our legislative methods, the members passed a resolution that 'all important Bills affecting the general Law should be referred back to the official Parliamentary counsel for this report as to the wording of such Bills after they have passed through Committee and that an opportunity should be afforded of amending any errors of language, any confusion of meaning or any conflict with existing law to which the attention of Parliament would thus be drawn.' The adoption of this proposal would, no doubt, prevent the more glaring lack of lucidity and precision in our Acts of Parliament ; but the Statute Book, which now contains, says Sir Mackenzie Chalmers no fewer than 30,000 Acts, can never be simplified until the process of codification with which Sir Mackenzie himself as the draftsman of the Bills of Exchange Act and other codifying measures is honourably associated is carried much further than it has been. Not a few text-book writers, instead of piling case upon case and statute upon statute, have prepared the ground for codification by enunciating the law in the form of rules of leading principles. The process of consolidation, too, has proved to be most beneficial and Sir Mackenzie Chalmers made the gratifying announcement that the Statutory Law Committee has in its archives the drafts of some thirty or forty Bills by which the process could be continued though he was careful to add that whether any of them would become Acts of Parliament lay on the laps of the gods. A complete Code, such as Bentham dreamed of, and some Continental countries have found it possible to create may be contrary to the genius of English Law and to English taste. That is all the more reason however why the tentative efforts which have usefully resulted in the codification of special branches of our law should be continued.—*Ibid.*

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The Return of Lord Moulton.—Lord Moulton, who since the beginning of the war has been rendering the nation most valuable service as Director of Explosive Supplies in the Munitions, has resumed his duties as a Lord of Appeal in Ordinary, and both the profession and the public have reason to be glad that his distinguished qualities as a Judge, of which his independence of judgment is certainly not the least conspicuous, are again being employed in the Judicial work of the House of Lords. The assumption that his acceptance of the position of Chairman of the British Dyes Corporation would result in his resignation of his office as a Lord of Appeal has proved to to be ill-founded. Lord Moulton, who is one of the foremost authorities in the country on chemicals, was appointed a Director of the Corporation by the Government which has large interests in the undertaking and he was elected chairman of the Corporation by his fellow-directors. He is continuing, therefore, to do work of national importance for which he is pre-eminently qualified and, though, the occupation by a Judge of such a position as that of chairman of the British Dyes Corporation would, in normal circumstances be open to objection. Lord Moulton may be trusted not to allow the traditions and atuhority of the Bench to retaining the office beyond the time which the national emergency demands.—*Ibid.*

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Home Rule and the Judiciary :—English lawyers, whatever may be their views on the Home Rule Bill, have a special interest in the judicial arrangements it contemplates. Two Supreme Courts are to be created, one for Southern Ireland

and one for Northern Ireland, each of which is to have a Lord Chief Justice. Each division of the country is to have a Court of Appeal, from which appeals will lie to a superior appellate Court, to be called the High Court of Appeal for Ireland on which the two Lord Chief Justices as well as the Lord Chancellor, will sit as *ex-officio* members. The creation of this superior appellate court for the whole of Ireland is one of several provisions in the Bill by which some attempt is made to preserve the unity of the Sister Isle. It is even more interesting to observe from the constitutional point of view that the principle of the unity of the United Kingdom is recognised by the provision that appeals from the High Court of Appeal for Ireland will lie to the House of Lords and not, as in the case of Colonial appeals, to the Judicial Committee. In other words the House of Lords will remain the supreme appellate tribunal for Ireland as well as for England and Wales and Scotland. That is true however only so far as ordinary litigation is concerned. Question of constitutional importance, such as the interpretation of the Home Rule Act or the Validity of any Act passed by either of the two Irish Parliaments may, at the instance of the Lord Lieutenant be referred to the Judicial Committee of the Privy Council. In the functions of the Lord Chancellor of Ireland a large alteration is proposed. He is to cease to be keeper of the Great Seal, and all his executive functions, apart from those relating to lunatics, charities, and solicitors, are to be exercised by the Lord Lieutenant. This proposal to confine the Lord Chancellor of Ireland to Judicial duties is exactly contrary to the oft-repeated suggestions which have been made concerning the office of Lord High Chancellor. Lord Langdale for instance proposed that the Lord Chancellor should cease to be the head of the Judiciary and Lord Haldane's Committee on the Machinery of Government which more than twelve months ago recommended the creation of a Ministry of Justice, proposed that the Lord Chancellor while remaining a member of the Cabinet should devote less of his time to judicial work. It is not within our province to criticise these provisions for the administration of the Law under the proposed system of Home Rule, but it is impossible not to recognise that they are calculated to result in a multiplicity of appeals and that the creation of two Lord Chief Justices and the changes in the Lord Chancellor's functions may tend to impair the prestige of two historic offices.

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The Constitution and the Judges.—Never, perhaps, in the history of the Judicial Committee of the Privy Council has an issue of greater general importance been presented than that in which a considered judgment was delivered this week by the Lord Chancellor on an appeal from a judgment of the Supreme Court of Queensland ousting the appellant from the office of Judge of that Court (*Mc Cawley* v. *The King on the relation of E. A. Carter and others and the Attorney-General of England Intervener*; March 8). The proceedings which led to the appeal arose on an information *quo warranto* exhibited against the appellant by the relators to show by what authority he claimed to be a Judge of the Supreme Court, and the dispute really arose on a recent Act of the Queensland Legislature, the Industrial Arbitration Act, 1916, which provided for the establishment of a Court to be called the Court of Industrial Arbitration with Judges to be appointed by the Governor in Council holding office for a term of seven years, and having in all respects and to all intents and purposes the rights, privileges, powers and jurisdiction of a Judge of the Supreme Court.........during good behaviour. The relators contended that this Act was in conflict with the Constitution Act of Queensland passed in 1867, as it purported to authorise the appointment of Judges for a limited term only, instead of for life as provided by that Act; and that having regard to the special characters of the earlier Act, it had not been varied with the formality and in the manner requisite for an alteration of the constitution. This contention was approved by the Supreme Court of the Colony, and confirmed afterwards on appeal by the High Court of Australia in each case, though only with some division of judicial opinion and the result was that the provisions in the Industrial Arbitration Act was declared to be *ultra vires* and unconstitutional and the appointment of the appellant whether as President of the Industrial Court or Judge of the Supreme Court of Queensland invalid and of no effect. More than the right to legislate as to the appointment of Judges and the variation of these powers was in issue however for the contest involved the whole question of the power of Colonial Legislatures to carry out constitutional changes, and, incidentally the relation of all members of the Judicial Bench whether at home or in any of the colonies to the Crown and to the Legislature. In reversing the decisions both of the Supreme Court of Queensland and the High Court of Australia declaring their own powers of legislative change, and freedom of judicial appointment, to be limited by the original Constitutional Act, the Privy Council has, perhaps, fixed a new standard, a very high standard of constitutional liberty throughout the Empire. And it is remarkable indication of the present day attitude in Imperial politics that the Crown only intervened not to assert any 'rights' over the Colonies, but to see that the point whether the Legislature of a colony which had a written Constitution could alter the constitution by a statute passed in the ordinary way and without any special formalities or expression of specific intention and purpose to alter the Constitution had full consideration and a judicial determination by the alternate tribunal of Appeal. That is a matter of course of the highest importance throughout the King's Dominions but no less important and significant is the new attitude which the Crown takes towards such problems, and the encouragement which it and the highest tribunal in the Empire give to the Dominions and Colonios to enlarge their independence and magnify their powers.

CONTEMPORARY LEGAL LITERATURE.

There is an article on state control of industrial accident insurance in the January number of the Journal of Comparative legislation. No system of Workmen's Compensation can be regarded as complete which does not include provisions ensuring that the compensation which the law declares to be due, shall be actually paid. The English Workmen's Compensation Act of 1906 recognises, but does not require insurance in respect of liability to pay compensation. It provides no guarantee on the one hand that the compensation shall in fact be forthcoming or on the other that in paying a compensation claim the employer will not be ruined. The absence of provision for guaranteeing compensation in the British Act, is peculiarly striking in view of the fact that it includes within its scope small employers generally, whereas many foreign statutes exclude agriculture, domestic service, and employers with less than a certain number of employees. The statutes of other countries exhibit two methods of securing the payment of compensation, (a) State guarantee, and (b) Compulsory Insurance. Then the systems prevailing under various Continental, Dominion and American Statutes are noticed with a view to afford guidance to the committee which has been appointed by the British Government to inquire into the working of the present system of Workmen's Compensation in the United Kingdom and suggest alterations and remedies for defects.

There is an article which is particularly deserving of attention just now on the South African Legislation relating to marriage or sexual intercourse between Europeans and Natives or coloured persons. The disabilities existing in the various South African States such as Cape Colony, Natal, Transvaal and Orange Free State are noticed, and also the penalties imposed by the various statutes for illicit intercourse.

There is also an article on fraudulent and voluntary conveyances of property contributed by Mr. M. V. Ramaswamy Iyer in which he compares the state of the law relating to the avoidance of fraudulent and voluntary conveyances under the Hindu Law, the Mahommedan Law, the Roman Law, and the English Common Law and the Statutes. This research if it is carried further and discloses any principle of Hindu or Mahommedan Law to any extent at variance with Section 53 of the Transfer of Property Act will have the result of overthrowing the entire case law which has applied that section to the Hindus and the Mahommedans, because the operation of Section 53 is excluded by the existence of any different rule uuder the Hindu or the Mahomedan Law.

The American Law Review for September, October 1919, has a short paragraph on the relative rights of the pedestrian and the automobilist.

" While an automobile may have a slightly superior right of way between crossings or the measure of care may not be as high as at the regular street crossings, this does not give automobile drivers a license to run down a pedestrian who may be seen more than 100 feet away. When circumstances such as these are presented, it is the duty of the driver to operate his car with care and attention to the safety of persons upon the highway. When he sees, or with reasonable diligence could have seen, the pedestrian in time to so operate his car as to avoid accident (the car not being fixed to any particular line of travel), it becomes his duty to so act, and if he fails to perform this duty he will be liable for such damage as may be occasioned as a result of his failure." (*Anderson* v. *Wood*, 107 Al. 658.)

The *Harward Law Review* for December 1919 has a leading article entitled "Waters : American Law and French authorities." In this article the writer traces the origin of American Law and the English Law relating to Riparian rights and other water rights to the French Law. The expression 'riparian' right is first attributed to Justice Story, in his opinion in the case of *Tyler* v. *Wilkinson* which is a classic in this branch of the Law. Both Story and Kent got their idea on this subject from the Civil Law and the later English Law on this subject is traced from Story, Kent and the Civil Law. Then the writer goes somewhat fully into the doctrines of the French Law with the anticipation that they will have interest and profit for us in the investigation of the problems we are now meeting every day, in working under the same Law of water courses which they have, and which came to us from them.

In the notes to the same part there is a contribution on the eligibility of women for public office. The question is considered in all its aspects with a reference to the authorities in England and in America. It has mainly arisen in connection with the construction of various statutes and in many cases it has been held that women are not entitled to hold office under those statutes. The writer has established after a full consideration of the authorities that at Common Law there is no disability for a woman to hold office. The article is remarkable alike for its research as for the varied aspects of the question that have been considered.

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PART I.] JANUARY 1920. [VOL. XXXVIII.

THE PROPOSED LAWYERS CONFERENCE IN MADRAS.

We welcome the idea of a Conference of the lawyers of this presidency. As the signatories of the manifesto summoning the Conference point out, the Bar in this presidency can be certainly proud of its achievements in the past. It has played a great and noble part in the development of the national spirit and the moulding of the national organisations in the presidency. It has stood out for law and well ordered liberty. It has displayed forensic talent of a high order not inferior to that of their professional brethren in England and other parts of the world. We are assured on very reliable authority that the directness and force of a Sundara Aiyar, the lucidity and pointedness of a Sankaran Nair, the subtlety of a Bashyam Aiyangar and the forensic eloquence of a Krishnasawmi Aiyar can bear favourable comparison to some of the best specimens of advocacy in the west. At the same time we cannot but own to a feeling of disappointment that the Bar has not done as much as it ought to do in the field of law reform, in the fostering of the spirit of a scientific study of law or in shaping legislation by offering expert opinion on matters on which expert opinion is asked or is likely to be useful.

Hindu law as administered by the British Courts is not in touch with the growing needs of the community. Its development has been arrested by a process of foreign judicial interpretation. We have not and cannot have at present the benefit of commentators like Jeemuthavahana or Vignaneswara. The Hindu law of inheritance in regard to Bandhu succession is in a state of utter chaos. There is absolutely no justification at the present day for the nearest Bandhu—say, for the sister's son under the Mitakshara scheme being postponed to the remotest Samanodaka. The share of the adopted son and of the illegitimate son is determined by principles unintelligible both to the layman and to the lawyer. The place of many a near relation is still undetermined in the scheme of succession. The anomalous widow's estate which is a creature of judge-made law is a perpetual source of discord. Succession to Stridhanam is based on alleged differences between forms of marriage which have no real meaning at the present day. The Mitakshara joint family exists only to create difficulties in the law of alienation and wills while the Judicial Committee is striking the joint family at its roots by the rule as to partition by unilateral declaration and pious obligation in regard to debts. The Judicial Committee with one voice proclaims that the Hindu Law contains within itself the principles of its own exposition while by a side track it introduces the English artificial rules as to powers and perpetuities. The chief merit of judge-made law with regard to the limits of the power to adopt consists in the puzzles and riddles which it propounds, which baffle the most ingenious intellects. These and other defects can only be remedied by Law reform being taken up in right earnest as one of its chief functions by the legal profession in India.

Indian Codes are drafted, amended and modified without expert opinion of the profession being brought to bear upon them. Oftentimes in spite of the consolidation of an enactment like the Government of India Act we find obsolete provisions repeated from the East India Company Act 1781 occurring side by side with either contradictory or inconsistent provisions in the new enactment. If only professional opinion has been focussed on removing such defects they could not have posssibly found a place there. Again in the field of practice and procedure splendid and yoeman service can be done by the members of the moffussil bar and yet it has to be said that neither the profession as a whole nor the public nor the Government have availed themselves of that help.

In regard to legal education we find the university syllabus of legal education altered and realtered once in two or three years without any recourse to professional opinion. In spite of towering geniuses in law in this presidency it must be said we have not kept pace with our Bengal brethren in the production of legal treatises. We have no chair corresponding to the Tagore-law professorship in Calcutta for helping the post graduate study of law. The munificence of the more rich and prosperous members of the profession has to be tapped for stimulating the growth of a scientific study of law and a comparative study of jurisprudence.

The profession has not organised itself and is not able to speak with an authoritative voice owing to want of homogeniety among its component parts. It is dominated by conflicting interests and consists of practitioners of different grades and descriptions. Anomalies having their origin in historic accidents are perpetuated without any justification for their existence in the present day. The senior vakil practitioner on the appellate side of the High Court who may not be in touch with the client at all is no better in point of legal status, than the Vakil who was enrolled the other day. The junior barrister advocate who may be very much in touch with the client and who may not be instructed by a solicitor or Vakil claims a higher legal status than the senior Vakil ; he has all the privileges of an advocate in England without any of the attendant disabilities. There is a growing feeling among the junior members of the profession that sufficient opportunity is not given for youthful talent and energy. The apprenticeship course which is insisted upon as an essential pre-requisite to a young man joining the profession in Madras is becoming more and more a farce and a suggestion is made in certain quarters for the course being gone through in the moffussil, care being taken to assist the formation of good and useful law libraries there. The profession is sadly in need of a readjustment. There is no hoary tradition of a professional code of ethics as in England nor is there any enacted code of professional rules to guide the practitioner. An innocent professional gentleman may thus find himself at the mercy of a litigant though he may not consciously have been guilty of any act of professional impropriety. Similarly the client may on a certain occasion find himself utterly helpless at the hands of an unscrupulous practitioner though such instances are rare.

The constitution of the High Court as it exists at present requires revision and alteration. The rule of proportion insisted on in section 101 of the Government of India Act 1915 was devised at a time when there was no strong indigenous bar in this country and is an anachronism at the present day. This subject has not received the attention it deserves either from the public bodies or from the legal profession in this presidency. The subject of the direct recruitment of the Superior grades of subordinate judiciary from the bar also requires careful and just handling by the profession.

To tackle the various problems above alluded to the Advocate-General of Madras in conjunction with other gentlemen has invited the active co-operation and sympathy of all sections of the legal profession all over the presidency with a view to help the formation of a central or authoritative organ of professional opinion and feeling. We have no doubt that the trumpet-call of the Advocate-General will be heartily and enthusiastically responded to by the profession.

We understand that the Conference intends following a double procedure (1) of passing resolutions on matters on which there is an unanimity or practical unanimity of professional opinion, and (2) of inviting papers on matters on which there is not a concord of professional opinion or there is not sufficient evidence of such a concord with a view to educate professional and public opinion in future.

We have no doubt that the proposed course will commend itself to the profession as in our view in matters of the kind likely to come up before the Conference a mere majority view is not likely to be of practical assistance. We await with interest, the proceedings of the Conference and we reserve our comments to a later issue.

Ramabhadra Raju v. **Maharajah of Jeypore** : I. L. R. 42 Mad. 813 P. C.

Except in so far as any case is covered by Section 21 of the C. P. Code, their Lordships' opinion seems to be that want of local jurisdiction is as fatal as want of jurisdiction as to subject-matter. Their Lordships held that the objection that part of the property was situate within scheduled district outside the jurisdiction of the Court in which the suit was instituted and hence *quoad* such portion, the suit was laid without jurisdiction was not merely an objection to the place of suing within the meaning of S. 21 of the C. P. Code but was an objection as to jurisdiction which made the order a nullity. S. 17 which confers jurisdiction on the Court in which part of the property is situate has no application except to cases where both the Courts having jurisdiction are governed by the Civil Procedure Code. The word " Courts " in that section means Courts governed by the Civil Procedure Code. The Civil Procedure Code does not apply to scheduled districts, and as such the section did not apply to the case.

Two further points in the case were (1) as to whether on the construction of the mortgage-deed in question the mortgagee had right to call in not only the interest but also the principal, (2) even if he had not, whether at the date of the decree the right having accrued a decree could not be given on that footing.

The High Court had held against the plaintiff (the mortgagee) on the first question but had held with him on the second. The Privy Council having held with the mortgagee on the first question, it became unnecessary to give a decision on the second.

On the second question their Lordships merely state the objection by the appellant to the decree as given and the reply by the respondent. His reply was as the proceedings were entirely executory, it was proper for the Appellate Court to pronounce a decree which would regulate the rights of parties as they stood at the time when the final judgment came to be pronounced.

There is a further sentence in the judgment of their Lordships which calls for notice. Their Lordships say "It is settled that apart from special stipulation there is no right to demand a sale of the mortgaged lands for payment of the interest in arrear." We don't believe that it meant any rescuscitation of *Kannu* v. *Natesa* [1] which cannot stand as against *Madappa Hegde* v. *Ramakrishna Narayan* [2].

Angamuthu Chetty v. **Viraraghavulu Chetty**: I. L. R. 42 Mad. 584 F.B.

This case decides that a reasonable provision for the maintenance and residence of the widow does not invalidate a surrender and this view receives confirmation from the judgment of the Privy Council in *Mussamut Bhagbut Koer* v. *Dhanubkhari Prasad Singh* [3]. But this case hardly disposes of the other difficulties with which the subject is beset. How far a surrender for consideration is good ? What difference would it make if the consideration is something for the benefit of a third party ? What is the effect of the omission of some small bit of property ? Would the fact that the omission is inadvertent make any difference ? The judgment of the Privy Council in *Rangaswami Goundan* v. *Nachiappa Goundan* [4] justifies the view that an alienation of the entire property with the consent of the reversioner may be upheld as a surrender but it can hardly be claimed that their Lordships have declared the limits of this doctrine that is whether the alienation will be supported even though a large portion of the money finds its way into the hands of the widow. We rather fancy that the alienation of the entire property can be supported as a surrender only if it satisfies the conditions of a valid surrender. Nor are we satisfied that the decisions that lay down that if the consideration is one for the benefit of the third party the surrender is good. Let us suppose it is a money provision for a third party. The only person that can enforce it is the widow. How could it be said that such a provision does not offend against the requirements of absolute surrender ? She can enter into a new arrangement with the reversioner or substitute a payment to herself. The question does seem to require a reconsideration or at least a fresh consideration.

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[1] (1891) I. L. R. 14 M. 427.

[2] (1911) I. L. R 35 M. 327.

[3] (1919) 37 M L. J. 513.

[4] (1918) I. L. R. 42 Mad. 523.

Sinnappan v. **Arunachalam Pillai** : I. L. R. 42 Mad. 844 F. B.

S. 64 of the Civil Procedure Code says that " where an attachment has been made, any private transfer or delivery of the property contrary to the attachment shall be void ". It was contended in this case that as O. 21, r. 54 says that where the property is immoveable the attachment " shall be made by an order prohibiting etc.", so soon as the order is made, the attachment is complete and the consequences indicated in S. 64 follow. The fallacy in the argument is that R. 54 says no doubt that an attachment shall be made by an order but it does not say that it is all that is necessary. The effect of the two clauses is that the attachment is the resultant of the order and its due proclamation. Language similar to O, 21, r. 54 is noticeable in r. 46, while rr. 44, 47, 48, 51, 52 and 53 show that it is only after actual communication of notice or seizure that attachment is deemed to be complete. The contention could not possibly go further than this, viz., that attachment is made by the order but subject to the condition that the proclamation is duly made. If the proclamation is not duly made, the attachment should cease to have force, but S. 64 recognises no such qualification. In fact the dissimilarity between the language in the latter set of sections and the former is due entirely to drafting exigencies.

Seeni Nadan v. **Muthuswami Piliai:** I. L. R. 42 Mad. 821 F. B.

There is undoubtedly much to be said in favour of the view of Sadasiva Aiyar J. Execution is but a stage of the suit and it is difficult to see how a Court which has no jurisdiction to try a suit is to have jurisdiction to execute it. No doubt, if the notification only takes away jurisdiction to *entertain* suits or in other words, the institution of fresh suits is prohibited the Court may have jurisdiction to try pending suits. We don't believe that there could be any difference in principle between trial of suits and execution. But there is one important distinction between suits on personal claims and suits relating to immoveable property. Once a suit is instituted even though a man may go out of the court's jurisdiction, the jurisdiction once vested in the Court is taken away. Therefore even though the local jurisdiction of the Court is altered, the Court may still have jurisdiction to execute the decree. Again, it must be noted that the Civil Procedure Code does make a difference between local jurisdiction and jurisdiction as to subject-matter, though as the Privy Council has recently laid down it is not a general principle of jurisprudence but a principle recognised by the Civil Procedure Code for certain purposes of the Code.

As regards the use of English cases, they do not stand on the same footing as other foreign decisions. For it has been declared by the highest judicial authority that rules of equity and good conscience for India are the rules of English law if they are not unsuitable to the Indian conditions. Again where an Indian statute is based upon or incorporates or adopts the language of the English statute *pari materia* undoubtedly the course of English decisions would be relevant in considering the true import of the Indian statute. Again much of the Indian statute is based upon the principles of English common law and the two cannot be wholly dissociated. With all this, we cannot help regarding the prejudice against American decisions as anything but insular. On many points, the Indian conditions are much more akin to the American than to the English and the resort to American authorities has not been on questions that relate to the statute law or special law of the country and the ignorance of the special procedure or the laws of that country is a reason for precaution and hardly a ground for avoiding the decisions altogether.

Rama Rao v. **Martha Sequeira** : I. L. R. 42 Mad. 796.

It is a question of construction in each case whether a Statute confers an absolute power irrespective of the consequences or only a power to do a thing if and in so far as it can be done without detriment to private rights ; one may add a third category as suggested by this case—if it can be done without detriment to be so done and if it cannot be done—then to be done at all costs.

Parbhu Narain Singh *v.* **Ramzan** : I. L. R. 41 All. 417.

If the defendant is in the position of a licensee as the headnote inaccurately puts it, there is very considerable difficulty in following the decision on the application of S. 40 of the Transfer of Property Act. If on the other hand, as put by Mr. Justice Walsh, there was a grant subject to a condition or agreement that the condition or agreement should bind a purchaser with notice is a perfectly intelligible proposition.

Mahomed Kasim *v.* **Rukhia Begam** : I. L. R. 41 All. 443.

Whether an adjustment of a decree is valid and binding against the decree-holder or is a fraudulent one not binding against him is a question undoubtedly "relating to discharge or satisfaction of the decree." It was possible to have interpreted the words narrowly so as to exclude suits for specific reliefs such as setting aside a transaction like adjustment or injunction as outside the scope of those words. But the tendency has been against such a course. Even so, if any particular order in execution is obtained by fraud, there is nothing in the section that requires recourse to S. 47 to set aside such order. Nor is there anything in S. 47 to justify the view that a claim for damages for fraud should be made to the executing court ; that would be beyond the competence of the executing court.

Khalil Rahman *v.* **Gokul Prasad** : I. L. R. 41 All. 526.

It is difficult to agree with the judgment in so far as it holds that the decree-holder purchaser is entitled to interest on his decree amount till the date of confirmation. Under Order 21 Rr. 84 and 85 C. P. C., every purchaser should deposit 25 p. c. of the purchase money immediately on the sale and the balance within 15 days thereafter. In the case of the decree-holder purchaser, he is entitled subject to S. 73 to set off the amount of his decree against the payment that he is to make At the utmost, what can be said for the decree-holder is that as regards 75 p. c. of his money interest should not run for the period of 15 days for which a purchaser has the right to postpone payment. Either as regards the 25 p. c. which every purchaser is bound to deposit immediately on the purchase or on the balance after 15 days he has no sort of claim for interest. From the date of the purchase, he gets his mesne profits and there is no reason in justice for his claim to interest after that date. On the other hand if the requirements of Rr. 84 and 85 do not apply to his case, he cannot also have the benefit of the time given under these rules. Satisfaction stands at most on the same footing as payment in the case of a stranger purchaser and there is no reason why entering up satisfaction should await confirmation any more than payment should.

Nazir Begum *v.* **Rao Raghunath Singh**: I. L. R. 41 All. 571 P. C.

In this case their Lordships apply to managers of Hindu families the rule laid down by their Lordships in the case of widows in *Hurro Nath Rai Chowdhuri* v. *Randhir Singh* [1]. It is incumbent thus on those who support a mortgage made by the manager of a joint Hindu family to show, not only that there was necessity to borrow but that it was not unreasonable to borrow at such high rate and upon such terms. In this case where there was necessity to borrow upon reasonable commercial terms for the full amount, their Lordships held that the mortgage would stand as good security to that extent but that all the terms of the mortgage in excess of that authority were not binding. On this ground their Lordships upheld the reduction of the rate of interest. Their Lordships considered it unsafe to rest the decision upon a supposed discretion in the court or an inference by the Judges as to the sum which would be sufficient to compensate the mortgagee. This power, their Lordships say, the courts have not got, that is to say their Lordships negative the inherent power claimed by some of the courts in India to reduce the rate of interest apart from any question of undue influence. Would this decision justify the court in upholding a usufructuary mortgage for 70 years to the extent of 12 years which it might consider is a reasonable period? It would not, of course, justify the upholding of a sale as a mortgage the two transactions being entirely distinct in character. Such a difficulty does not exist in the case of a mortgage. The alienee may not have the usufruct for 70 years as he hoped he would have but would have something of the same kind but of a shorter duration. The decisions in India were against such a partial upholding. See *Kaliani Amma* v. *Govinda Menon* [1]. If the mortgagee is not agreeable to such a course, even then is the court bound, if the plaintiff wants it, to uphold the mortgage, to the extent it finds is supported by necessity ? The point is interesting.

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[1] (1890) I. L. R. 18 Cal. 311.

Kumad Bandhu Saha *v.* **Ramesh Chandra Saha**: I. L. R. 46 Cal. 749.

This case raises some interesting questions in the law of adoption. A Hindu made a bequest of his property disposing of three-fourths in favour of his son and one-fourth to his own widow for her life. The son survived his father and died when he was about fifty years old leaving behind him his widow as heiress. Then his mother adopted in pursuance of a power to adopt given by her husband. The question arose about the validity of the adoption ; and the learned Judges held that the spiritual purposes of a son are not exhausted in the person of a son who though he attains maturity yet dies without issue. Further the learned Judges held that as the adoption did not divest the estate vested in the hands of the son's widow and only operated to divest the estate in the hands of the adoptive mother, the adoption was good. We think on the first ground of decision, full effect has not been given to the rule laid down by the Privy Council in *Madana Mohana Ranga Bheema Deo* v.*Purushothama Ranga*[2] which is referred to in the arguments and the judgments. The son of the original owner who died when he was fifty years old did undoubtedly attain full legal capacity to continue the line by a natural born son to him or by an adoption. The fact that he survived only for about one and a half years is not material on this question. Their Lordships of the Judicial Committee further point out that when the son dies after attaining full legal capacity, the power of the original owner's widow to adopt is at an end, even though the son's widow may not have power to adopt. In this view therefore the fact that the son's widow in this case had no authority to adopt from her husband would be immaterial in deciding whether the mother's power to adopt still subsisted. It is also worthy of notice that this rule as to the termination of authority has been re-stated by the Privy Council in the later case of *Pratapsing Shivsing* v. *Thakor Shri Agarshinghj* [1]. The second ground of decision that the adoption is good because it divests no estate but that of the adopting widow herself is not by any means conclusive of the existence of a power to adopt. See *Ramakrishna* v. *Sham Rao,* [2] approved of in *Madana Mohana Ranga Bheema Deo* v. *Purushothama Ranga* [3].

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[1] (1911) I. L. R. 35 M. 648.

[2] (1918) I L. R. 41 Mad. p. 855.

Further, the present case is analogus on the facts to *Thayammal* v. *Venkatarama* [4] but for the fact that the adopting mother in the present case had some properties of the original owner vested in her hands ; and we therefore venture to think that the authority did not subsist at the date of the adoption. It may also be mentioned here that the divesting of vested estates is not by itself a ground on which an adoption can be rendered invalid. See. *Pratapsing Shivsing* v. *Thakor Shri Agarshinghji* [1].

Chiranji Lal v. Naraini, I. L. R. 41 All. 933.

In *Putti Narayanamurthia* v. *Marimuttu* [5] a somewhat narrow view is taken of the right of a person having a right to be indemnified. The equity Courts in England have taken a more liberal view and have always recognised a power in Courts to compel the person who is bound to indemnify to put the other party in funds to meet the liability. There is no reason why the Indian Courts which are both Courts of Equity and common law should not exercise the power recognised as existing in England and so much in accord with the requirements of equity and good conscience.

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[1] (1918) 36 M. L. J. 511.

[2] (1902) 26 Bom. p. 526.

[3] (1918) 41 Mad. p. 855.

[4] (1887) 10 Mad. p. 205.

[5] (1902) I. L. R. 26 Mad. 322.

Durga Prasad *v.* Shambhu, I. L. R. 41 All. 656.

If an office like that of Maha Brahman is a right of personal service, it is difficult to see how it could be alienated even privately. The difficulty may be got over thus: Though the office involves service, custom permits service by proxy and hence no principle is violated in permitting an alienation of the office. Court sale is however prohibited as being against public policy. This we think, is the right ground on which prohibition of court sale is to be put in cases where vicarious performance of service or private alienation is by custom permitted.

Wali Bandi Bibi *v.* Tabeja Bibi, I. L. R. 41 All. 534:

The wording of S. 52 of the Transfer of Property Act justifies the view taken in this case. The words are: "During the active prosecution of a contentious suit in which any right to immoveable property is directly and specifically in question." Though it has now been finally decided by the Privy Council that for the application of the rule of *lis pendens*, it is not necessary that summons should have been served on or even issued to the defendant and the suit becomes contentious from the very institution of the plaint, the point remains open, whether every amendment of the plaint whatever its nature, should be held to refer back to the date of the plaint for the purpose of the application of the rule of *lis pendens*. As their Lordships say an amendment may refer back to the date of the plaint for the purpose of limitation but it cannot refer back to the date of the plaint so as to attract the application of the rule of *lis pendens* when the contention as to the particular immoveable property is raised only by the amendment. The case would be different if the original description is sufficient to identify the property and the amendment is made only with a view to correct some misdescription. The whole question is—was the description of the property originally given sufficient in spite of all its imperfections, to identify the property or is it the amendment only that fixes the property? In this case the effect of the amendment was to substitute one item of property for another, an obvious case if the test above stated is the right test.

Bindo Bibi v. Ramachandra, I. L. R. 41 All. 583.

As pointed out by *Sir Bhashyam Aiyangar, J*, in *Gangi* v. *Ramaswami* [1] "cause of action" is not an abstraction, something independent of the defendant and though the ground of title might be the same such as heirship or purchase, if the defendants against whom the title is asserted are different, for the purposes of O. 2 R. 2. the causes of action are different. No doubt, where the ground of title is the same, it is open to the plaintiff to combine claims against various defendants but that is because O. I. R. 3 (or Old S. 23) is worded differently.

Kalyan Mal v. Kishen Chand, I. L. R. 41 All. 643.

This case puts the somewhat tangled subject of limitation applicable to claims in respect of moveable property deposited with another in a clear light.

Abdul Rahim v. Sital Prasad, I. L. R. 41 All. 658.

Where a party appears by pleader and the pleader being instructed only to apply for adjournment, on the same being refused retires from the case, saying that he has no more instructions, the bulk of the Madras authority is in favour of regarding the case as one for disposal for default of appearance. There is some authority for the position that in those circumstances if a party appears by pleader, his own physical presence would not make any difference *Gopala Rao* v. *Maria Pillai* [2]. This may be going too far. However that may be where the party appears by himself, there is no room for the application of any such rule of constructive default for appearance and the disposal can only be on the merits There is authority in Calcutta which requires the Court to dispose of a case on the merits when there are materials enough to go upon even where there is default of appearance by the party. This view is not approved of in Madras, See *Pitchamma* v. *Sriramulu* [3].

Khub Singh v. Ramji Lal, I. L. R. 41 All. 666.

The question in this case was whether on the construction of a will in which the devisee was described as the adopted son of the testator, the devise was to him as a *persona designata* or whether it was conditional on his being an *adopted* son in fact and in law. The kinds of cases on this head may be thus classified, (1) cases whether the legatee is to take the property, the character given to him being merely by way of description and as such if inaccurate to be disregarded (2) cases where adoption is the fact recited and the words about taking the property are only statements of the consequences of a valid adoption (3) cases where a valid adoption is a condition precedent to the taking of property. *Nidhamoni Debya* v. *Sarada Pershad Mukerjee* [1] *Subbarayar* v. *Subbammal* [2] *Sri Raja Venkata Surya Māhipathi Rao* v. *The Court of Wards* [3] *Lalta Prasad* v. *Paligram* [4], *Murari Lal* v. *Kundan Lal* afford illustrations of the first class; *Vireswar Mukerjee* v. *Ardhachunder Dey* [6] *Finindra Deb* v. *Rajeswar Das* [7] and *Lalji* v. *Murlidhar* [8] of the second class and *Abbu* v. *Kuppammal* [9] of the third class. It is a nice point in each case as to whether the particular case falls within one or other of the classes. In most cases it is difficult to see why there should be an express gift at all to an adopted son unless the intention is that he should take it whether or not there is a valid adoption or unless the documents are intended merely as evidence of adoption or of a power to adopt.

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[1] (1902) I. L. R. 25 Mad. 736.

[2] (1906) I. L. R. 30 Mad. 274

[3] (1917) I. L. R. 41 M. 286 (F. B.)

Jai Chand Bahadur *v.* **Kunwar Singh** I. L. R. 41 All. 669.

While we agree that there is a distinction between cases coming within art. 142 and those coming within art. 144 and the burden of proof in the latter class of cases is on the defendant to prove adverse possession for the requisite period, we cannot admit that it is open to the plaintiff in any case by a sheer device or legerdemain such as by alleging that the defendant is a licensee to get rid of the application of art. 144. If a license is in the first instance proved, art. 144 would then apply and it would be for the defendant to prove twelve years' adverse possession. If the license is not proved, then the position would in spite of the allegation to the contrary by the plaintiff be as if there was an allegation of possession and.

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[1] (1876) 3 I. A. 253,

[2] (1900) I. L. R. 24 Mad. 214 P. C.

[3] (1898) I. L. R. 22 Mad. 389.

[4] (1908) I. L. R. 31 All. 5.

[5] (1909) I. L. R 31 All. 389.

[6] (1892) I. L. R. 19 Cal. 513.

[7] (1884) I. L. R. 11 Cal. 463 P. C.

[8] (1906) I. L. R. 28 Mad, 488 P. C.

[9] I. L. R. 16 Mad. 355.

art. 142 would be the appropriate article See *Dahrani Kanta* v. *Sarbasi Ali Khan* [1] *Subappa* v. *Venkappa*[2] and *Venkatarayudu* v. *Sankarayya* [3] *Secretary of State for India* v. *Chelikani Rama Rao* [4] would seem to be hardly in point. The party on whom their Lordships held the burden of proving 60 years' adverse possession lay was a claimant in proceedings under the Forest Act. In their Lordships' opinion objectors to afforestation preferring claims are in law in the same position as persons bringing a suit in an ordinary court of Justice for a declaration of right. To such a situation in the one as in the other case their Lordships say art. 144 applies. If so, it could not be doubted the onus of establishing possession for the requisite period would rest on the claimant. The Madras view that is overruled by their Lordships was that when twelve years' adverse possession is proved against Government onus is shifted on them to disprove possesssion for the statutory period.

Varadarajulu Naidu *v.* **King Emperor**: I. L. R. 42 Mad. 885.

The rule laid down in this case is very valuable from the point of view of the liberty of the subject. The law of sedition is so widely defined that the only safeguard against undue encroachment on the liberty of the subject is that the launching of the prosecution is committed to the discretion of such a highly responsible body as the Local Government. If the power can be exercised by a single member of the Government much of this safeguard disappears. As a question of interpretation of the law, it is untenable that the power conferred on the Governor-in-Council should be exercised by a single member, S. 49 of the Government of India Act notwithstanding.

The powers of the Appellate Court to admit fresh evidence cannot be wider than those possessed by the Appellate Court in civil cases and must be governed if at all by considerations more favourable to the accused, than to the prosecution. The Court must think that the additional evidence is necessary for the satisfactory decision of the case and not merely to supply defects in the prosecution case.

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[1] (1912) 25 M. L. J. 95 P. C.

[2] (1914) I. L. R. 39 Bom. 336.

[3] (1910) 20 M. L. J. 306,

[4] (1916) I. L. R. 39 M. 617 (P. C.)

Krishna Pal Singh v. Desraj Ranjit Singh, I.L.R. 41 All. 517.

No doubt the term mesne profits includes interest and in ascertaining the amount, deductions can properly be made from the amount of mesne profits to be allowed, in respect of assessments paid, etc. But when the amount is ascertained and a decree is passed for a definite amount without any provision for interest or for deduction of the assessment paid or to be paid, it is not open to the executing court to consider these questions as it would thereby be adding to the clear terms of the decree See *Harmanajoe Narain Singh* v *Ram Prasad Singh* [1].

Jaikali v. Baldeo Singh I. L. R. 41 All. 515.

Where there is a contract with a member of an undivided Hindu family for the sale of some property, their Lordships hold in this case that on his death, the widow is entitled to come on record as the legal representative, we think rightly. Even if the contract was entered into for the benefit of the family at least so long as the family does not intervene, the widow would be entitled to enforce the contract.

Badri Prasad *v.* **Bihari Lal** I. L. R. 41 All. 553.

O. 32 R.7 is as pointed out in this case, more strict than S. 462 (old code) and requires not only that a guardian or next friend of a minor should not compromise without leave but also that such leave should be expressly recorded in the proceedings. Any compromise entered into without the leave of the Court so recorded is voidable at the instance of the minor. Having regard to the observations of the Privy Council as to the necessity for strict compliance with the terms of the section in *Subramanian Chettiar* v. *Raja Rajeswara Dorai*[2] *Ganesha Rao* v. *Tuljaram Rao* [3] and *Manahar lal* v. *Jadunath Singh*[4] it would be a strange thing indeed to regard the provision as to recording the leave as directory or even to view its non-observance as an irregularity affecting the compromise only in the event of prejudice. To this extent, the judgment seems to be all right. But there is some difficulty in appreciating the next part of the judgment. Their Lordships after finding that the compromise is voidable, ask the lower Court to try the issue as to whether the compromise injuriously affected the rights of the minors. One should have thought the point quite immaterial after the judgment of the Privy Council in *Tuljaram Rao case* [1]. There, the Courts below had upheld the compromise on the ground that it was a bona-fide settlement of doubtful rights by the manager but the Privy Council set aside the compromise on the mere ground that leave of Court had not been obtained. In *Sethuram Sahib* v. *Vasanta Rao* [2] one of the grounds on which the Subordinate Judge had refused to set aside the compromise was that the compromise was beneficial to the minor. Both the High Court and the Privy Council set aside the compromise on the ground that leave of Court had not been obtained for the compromise. This view of the section has been taken also in *Vijaya Ramaya* v. *Venkata Subba Rao* [3] and in *Bhiwa* v. *Devchand* [4]. No doubt a different view was taken in *Aman Singh* v. *Narain Singh* [5]. In the face of the rulings of the Privy Council, they case is not entitled to any authority. But there is one aspect of the case which might justify the remand. It does not clearly appear but the statement of facts suggests that the plaintiffs were minors even at the date of the suit. The minor when he comes of age would have no doubt absolute discretion whether he would abide by the compromise but his guardian, *a fortiori,* his next friend would have no such absolute discretion and the Court would not be bound to set aside the compromise, at their instance unless the compromise operates injuriously to the interests of the minor.

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[1] 6 C. L. J. 462.

[2] (1915) I. L. R. 39 Mad. 115.

[3] (1913) I. L. R. 36 Mad. 295.

[4] (1906) I. L. R. 28 All. 585

Raghubar Dayal v. **The Bank of Upper India Ltd.**, I. L.R. 41 All. 566 P. C.

The point in this case was whether a compromise or arrangement between a company and its creditors with the sanction of the court was binding from the date of the meeting at which the requisite 3-4ths majority assented to the arrangement or from the date of the sanction of the court. Their Lordships on the interpretation of S. 153 of the Indian Companies Act hold that the compromise takes effect from the date of meeting subject however to the condition that it does not fail to have the sanction of the Court.

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[1] (1913) I. L. R. 36 Mad. 295
[2] (1910) I. L. R. 34 Mad. 314.
[3] (1914) I. L. R. 39 Mad. 853.
[4] (1911) I. L. R. 35 Bom. 322.
[5] (1897) I. L. R. 20 All 98.

Makrand Singh *v.* **Kallu Singh** I. L. R. 41 All. 581.

Cases have for some time been accumulating in support of the view that when the creditor has an option to sue for the principal on default to pay interest, limitation commences to run from that date only if he chooses to exercise his option and not otherwise. *Narna* v. *Ammani Amma* [1], *Ramadh bibi Ammal* v. *Kandaswami Pillai* [2]. This view seems to be opposed to the trend of decisions in England as may be seen from *Hemp* v. *Garland* [3] and *Reeves* v. *Butcher* [4]. The Allahabad High Court which took the contrary view in *Gayadin* v. *Jhuman Lal* has adopted this view since. The English view proceeds on the principle that there being a right to sue on the first default for the purposes of limitation the right to sue accrued then whether the party chose to sue or not. The cases that hold to the contrary argue that the right to sue accrues only if the party exercises his option and treats the default as giving rise to a right to sue. Even the latter set of cases would not apparently treat the cause of action as accruing later if the document could not be read as giving an option but absolutely prescribes that on default, the debt shall become payable.

Dwaraka Singh *v.* **Ramnad Upadhia** I. L. R. 41 All. 592.

It has been held by the Calcutta High Court in *Khetter Chunder Mukherjee* v. *Khetter Paul* [6], by the Madras High Court in *Ponnambala Parapravan Haji* v. *Sankaran Nair* [7] and *Nanu Nair* v. *Astamkoorthi* [8] and the Allahabad High Court in *Ishri Prasad* v. *Lalla Jas Kunwar* [9], that the presumption under S. 90 of the Evidence Act applies not only when the originals are produced but also in all cases where secondary evidence is properly admissible of such documents. We feel great difficulty with Mr. Justice Walsh in accepting the interpretation put upon S. 90 in these cases. The language is-where a document is produced. Because under some other section in certain circumstances the original need not be produced, without any express authority in the Act therefor, one is not justified in putting into the section words such as "or when secondary evidence of such document is given." Though it is difficult to accept the suggestion of Mr. Justice Walsh that the presumption might be justified by applying what is known as the equity of the statute or by an appeal to rules of equity and good conscience (for such appeals are wholly inadmissible having reference to S. 2 of the Evidence Act) his other suggestion that S. 114 of the Evidence Act may justify the conclusion would seem to be more in consonance with the provisions of the Act.

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[1] (1916) I. L. R. 39 Mad. 981.
[2] (1919) M.W.N. 82.
[3] (1843) 4 Q.B. 519.
[4] (1891) 2 Q.B. 509.
[5] (1915) I. L. R. 37 All. 400.
[6] (1880) I. L. R. 5 Cal. 886.
[7] (1911) 21 M. L. J. 981.
[8] (1915) 29 M. L. J. 772.
[9] (1900) I. L. R. 22. All 294.

Piari Lal-v-The Muir Mills Company I. L. R. 41 All. 618.

This decision would, if accepted, avoid many unneccessary complications. Where the managing member of a Hindu family has shares in a company, on his death, if the company should accept the next managing member as the principal heir and register his name, much confusion that should otherwise arise in the administration of the family affairs might be avoided. The position of the managing member is analogous to that of a trustee but is not exactly that of a trustee and on his death the other members as a whole take the estate by succession. The ordinary rule of inheritance that is prescribed is not applicable to such cases at all. It is a *genus* of property to which the other rule known as the rule of survivorship, nevertheless a rule of succession, is applicable. The recognition of the senior most member of the family in these circumstances is not the recognition of a trust in favour of the other members of the family. For the purposes of the Court Fees Act some of the Courts have, no doubt, held that the position of the head of the family is that of a trustee *Collector of Kaira* v. *Chunilal Harilal* [1] and *In re Manavala Chetty* [2], *In the goods of Pokurmull* [3], but the beneficent construction of the words of a taxing statute cannot supply a valid precedent for other cases.

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1. (1904) I. L. R. 29 Bom. 161, 2. (1909) 19 M. L. J. 591.
3. (1896) I. L. R. 23 C. 980.

Shahasaheb v. Sadasiv Supdu. I. L. R. 43 Bom. 575.

The only point decided in the case is that a suit on a mortgage is not liable to be dismissed, where only some of the heirs of a mortgagee are sued on the mortgage. In considering this question we have to keep out of view the cases where the manager of a joint Hindu family is sued in which case he is sued in a representative capacity and the other members of the family are effectively represented in law by the manager *Sheo Shankar Ram* v. *Jaddo Kunwar* [1]. Where there is no such representative capacity as in the case of Mahomedan heirs each heir can ordinarily represent only his own share of the entire equity of redemption. That such a suit where all the heirs of a Mahomedan mortgagee are not made parties cannot be dismissed for such non-joinder is clear after the enactment of O. 1 R. 9 of the Civil Procedure Code and the alteration in the language of O. 34 R. 1, even assuming there was any doubt earlier. An obvious distinction has to be made where the mortgagors are a number of co-trustees and one or only some of them are sued on the mortgage. In such a case any single trustee or some only of the body of trustees cannot represent any distinct fractional share in the equity of redemption ; and consequently a suit may still have to be dismissed to which all the trustees are not defendants unless the remaining trustees are added as parties within the period of limitation. A somewhat more difficult question will be whether when a suit is brought against some only of the heirs of the mortgagor and they do not occupy a representative capacity the entire mortgage amount may be realised from their shares or only a proportionate share of the amount. The Madras High Court has recently held in a Full Bench in *Perumal Pillai* v. *Raman Chettiar*, [2] that even when some of the mortgaged items are released by the mortgagee, so long as the mortgage on them is not distinguished, the entire mortgage amount can be recovered on the other items. The question is not altogether free from conflict among the various High Courts. See *Jagal Kishore Sahu* v. *Kedar Nath* [3]. We therefore think that at least so far as Madras is concerned, the shares of the heirs who are sued may be made liable for the whole mortgage.

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[1] (1914) I. L. R. 36 All. 383.

[2] (1916) I. L. R. 40 Mad. 968.

[3] (1912) I. L. R. 34 All. 606.

Hanmant Kashinath *v.* **Ganesh Annaji.** I. L. R. 43 Bom. 612.

This decision brings the Bombay view of the class of debts of a Hindu father for which his sons are liable into line with the decisions on the question in Calcutta and Madras. The leading decision on the subject is that of Mr. Justice Mookerjee in *Chakauri Mahtan* v. *Ganga Prasad* [1]. It has since been adopted in Madras in *Venugopala Naidu* v. *Ramanathan Chetty* [2]. A somewhat more restricted view of the class of debts of the father for which the son is liable was taken in Bombay in *Durbar Khachar* v. *Khachar Harsur* [3]. It has since been departed from and this decision applies the enunciation of the law as made in *Chakauri Mahton* v. *Ganga Prasad* [1].

The other point decided in the case is whether the dictum in the judgment of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* [4] has the effect of declaring the law as different from what it was understood to be prior to that. That it has not that effect is clear from other passages in the judgment of the Privy Council in the same case, which affirm the liability of the Hindu son for his father's debts during the father's lifetime. This question was fully considered by the Madras High Court in the case of *Pedá Venkanna* v. *Srinivasa Dikshitulu* [5] which is referred to in the judgment in this case. On the further proposition of law laid down by Mr. Justice Kumaraswami Sastri in the same case, we must submit it would be somewhat inconsistent to say in one place that the observation of their Lordships of the Privy Council is not a considered pronouncement and in the other that it has introduced a qualification in the liability of the Hindu son for his father's debts, restricting it only to cases where the father's share of the joint family properties or his self-acquisitions are insufficient to meet the debts. Whatever warrant there may be for this view in the texts, it has not been recognised in the cases which are said to be left unaffected by the Privy Council and such a rule will also be difficult to work out in practice.

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[1] (1911) I. L. R. 39 Cal. 862.

[2] (1911) I. L. R. 37 Mad. 458.

[3] (1908) I. L. R. 32 Bom. 348.

[4] (1917) 44 I. A. 126 at page 131.

[5] (1917) I. L. R. 41 Mad. 136.

Jwala Singh v. Sardar I. L. R. 40 All. 629.

Whatever the rank of the illegitimate son of a Kshatriya by a Sudra woman, the application of the term Ugra to him seems to be wrong. It is not justified by the texts cited in *Brindavana* v. *Radhana* [1] " *Vaishya Shudriyostu Rajanayat Mahishyograu Sutau Smritau* " is text of the Yagnavalkya. The comment of Vignaneswara thereon is "*Vaishyayam Shudrayam Chavinnayam,*' i. e., the terms Mahisya and Ugra are applicable only to children born of wedded wives. That this is the correct interpretation is perfectly clear from the words of Yagnavalkya "*Vinnasu Yesha Vidhih Smritah.*" "*Vinnasu,*" means according to Vigneswara "*Voodhasu* " i.e., married women. Commenting upon the analogous provisions of Manu, Kulluka points out '*Kanya Grahanad Atra Udhayam iti Adhyaharyam*" and Justifies the interpretation by referring to the words of Yagnavalkya " *Vinnasu Yesha Vidhih Smritah.*" It is quite another question whether though the issue is not an Ugra, he is not something higher than a Sudra in which case also his illegitimate son would not inherit.

Sundaram Pillai v. Ramaswami Pillai: I. L. R. 43 Mad. 32.

The question in this case was as to who was the preferential heir under the Hindu Law to a maiden's estate—the father's paternal uncle's son or the father's sister. Reliance was placed on Brihaspathi's text cited in Smriti Chandrika and Sarasvati Vilasa to give the latter preference. This text of Brihaspathi as translated in the Privy Council judgment in *Bai Kesserbai* v. *Hunsraj* [2], does not seem to refer to the father's sister as heir at all. But assuming that the text properly translated does recognise the right of the father's sister as a secondary mother to special right of inheritance, the interpretation adopted by the Privy Council in *Bai Kesserbai* v. *Hunsaraji* [2], is that the text should not be taken as laying down any absolute right of succession or even order of precedence but only as affording illustrations of the general rule of Mitakshara that in certain cases father's sapindas succeed and that in others husband's sapindas succeed. So far as the Madras decisions go, in *Raju Gramany* v. *Ammani Ammal* [3], it was held that the text of Brihaspati was too uncertain to

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1. (1888) I. L. R 12 Mad. 72. 2. (1906) I. L. R. 30 Bom 431.
3 (1906) I. L R. 29 M. 358.

afford basis for a decision contrary to the plain provisions of the Mitakshara. This was as regards the right of inheritance to a married woman's estate in connection with which alone the text is cited both in the Smriti Chandrika and Sarasvati Vilasa. It may be argued that on the question of maiden's inheritance there is no clear rule of the Mitakshara to the contrary. But it should not be forgotten that its application to the case comes in only by analogy. When its application to the main case itself is denied there is no foundation for the extension by analogy. The word stridhnana has an etymological and not a technical import under the Mitakshara and as such would include the maiden's property and the general rule for all cases of stri. dhana laid down by Yajnavalkya is—*Bandavah Tadavapnuyuh.* On this Vijnaneshwara says *Samanyena Bandhava Dhana Grahanadhikarino Darshitah.*—The general rule is hereby indicated *viz.*, that the Bhandavas are entitled to inherit. Bandhavas in the case of a maiden, are subject to special text of Baudhayana (which differs from the text of Brihaspati in being expressly applicable to maiden's property) the sapindas of the girl, *i. e.*, to say her father's sapindas for the reasons elaborated in *Tukaram* v. *Naravana Ramachandra* [1]. That this the scheme of the Mitakshara is also clear from the fact that even in the case of married woman's property though the rule of Yagnavalkya stops with the husband and the father, Vignaneswara brings in their respective sapindas under the head of Bandhavas.

Raja of Ramnad *v.* Venkatrama Aiyar : I. L. R. 43 Mad. 69.

Section 192 clause (e) provides that no set off legal or equitable shall be pleaded by way of defence to any suit under the Estates Land Act. This does not prevent the defendant from pleading any arrangement by which the rent itself is reduced or for the matter of that any arrangement under which the tenant is entitled to deduct any amount from the rent payable by him What he cannot plead is a set off that is to say he is not entitled to ask the Court to deduct any amount to which he is entitled from the landlord from the amount due to the landlord as rent.

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[1] (1911) I L. R. 36 Bom. 339.

Veeraraghava Reddy *v.* **Subba Reddi**: I. L. R. 43 Mad. 37.

The question here was—is an alienee *pendente lite* who is made a party defendant to the suit bound by a compromise entered into between the alienor defendant and the plaintiff after the alienation but before the alienee was made a party to the suit. Their Lordships hold differing from the learned Chief Justice and agreeing with Srinivasa Aiyangar J., that he is not bound. The rule as to *lis pendens* goes only so far as to bind transferees *pendente lite* by orders made in the *lis* but it does not prescribe what orders must be passed in the suit. There is no reason why the alienee who is made a party to the suit should be bound by a compromise made after he becomes a party, between the original plaintiff or defendant (his transferor) and the other side. But this was a different case. Here the compromise was made before the transferee became a party to the suit. It does not appear whether the other side had notice of the transfer. The distinction is not clearly brought out in the judgment. A passage in Mr. Justice Kumaraswami Sastri's judgment at page 50 seems to merely notice it but it could hardly be said to have brought it out fully. "Order 23 Rule 3 contemplates a compromise or adjustment between all the parties to the suit and it is difficult to see how the Court can pass a decree on a compromise to which a party to the suit was not a party without such person's consent unless it can be held that a compromise as a compromise between the original parties is binding on the alienees pending the suit. To do so would be to extend the doctrine of *lis pendens* to agreements between the original parties to a suit which may at some further date enable them to get a decree in terms thereof." Now Order 23 R. 3 does not say that the suit should have been adjusted as between all the parties to the suit; all that it requires is that the suit should have been adjusted wholly or in part by a lawful agreement or compromise. So long as the transferee has not brought himself on record or attempted to bring himself on record, the other parties are entitled to ignore the existence of parties other than those actually on record, and it may be said to be a legitimate corollary to the rule of *lis pendens* that compromise with such parties should bind the transferees. Where the other party has notice of the transfer, it might in certain circumstances, amount to fraud if he ignored the existence of the transferee. But apart from fraud, when the trasferee has done nothing to show that he proposes to act independently of the transfer or in the conduct of the suit, the other side who acted *bona fide* should not suffer. The transferee has purchased only a property in action subject to all the disabilities attaching thereto one of such disabilities being to be bound by the action of the party on record. On the other hand, this argument would be equally open even if no decree is passed in terms of the compromise but by reason of the compromise the suit is withdrawn or dismissed but that would obviously be going too far. The true theory according to the other view on which the compromise decree is held binding against the *pendente lite* purchaser is not that the compromise binds him but the order passed on the compromise binds him. If he had any objection to the decree being passed on the compromise he ought to have urged it before the order was passed. The view if logically pressed should lead to the conclusion that a party putting forward such a compromise with the knowledge of a transfer which the compromise should not bind would be guilty of fraud, and the decree may be liable to be set aside on that ground. This also again looks like going too far. The subject is strangely bare of authority.

Briji Kessoor Lal v. Official Assignee of Madras. I. L. R. 43 Mad. 71.

The words "payment in full" in the corresponding section of the English Bankruptcy Act have been strictly interpreted and have been held to mean *actual* payment in full and not mere discharge. It seems to be but right that Indian Courts should adopt the construction, adopted by the English Courts of similar words in an English statute on which the Indian statute is substantially based. A private arrangement which has not gone through the formalities prescribed by Section 28 a cannot of course be said to be a composition within the meaning of that section though there is nothing in its being subjected to the process of submission to creditors and to Court and being ultimately passed:

Ramaswami Pillai v. The Deputy Collector of Madura: I. L. R. 43, Mad. 51.

The Land Acquisition Act does not provide a special period of limitation for appeals from the awards of the District Courts. Art. 156 used to be applied to such appeals. It was contended in this case that that article did not apply, neither the first column nor the third column being appropriate for the purpose. The first column is under the Code of Civil Procedure ; appeal to the High Court. The third column—The date of the decree or order appealed from. It was argued that the appeal was not under the Code of Civil Procedure and that what is appealed against is not a decree or order but an award as laid down by the Privy Council in *Rangoon Botatoung Co. Ltd.* v. *The Collector, Rangoon* [1]. Their Lordships overruled the contention and held that the Art was applicable. Their Lordships interpret the first column as including all cases where the procedure under the Code of Civil Procedure is applicable following the judgment of Wilson and Porter, JJ., in *Aga Mahomed Hamadani* v. *Cohen* [2]. As regards the third column, their Lordships confine the judgment of the Privy Council to the circumstances of the case where the question was whether an appeal lay to the Privy Council. On the whole, it is an attempt to readjust the statutory provisions in India proceeding on the assumption that the award is a decree to the situation created by the Privy Council decision referred to above.

Ambalal Bapubai v. Narayan Tatyaba : I. L. R. 43 Bom. page 631.

The question referred for the decision of the third Judge was in the language of Heaton, J., one merely of construction of the terms of a decree ; but the answer of Shah, J., was not restricted to the question of construction alone but expresses the opinion on the substantial question of law whether where a decree directs payment of money and declares a charge on immoveable property therefor, the property is liable to be sold without the institution of a suit under Section 67 of the Transfer of Property Act. That the answer to this question can only be in the affirmative is clear from the language of Order 34 rules 14 and 15 and Section 100 of the Transfer of Property Act. A charge created or declared by a decree cannot come within the definition of a charge in Section 100 of the Transfer of Property Act and Order 34 Rule 15 is purely restricted to the classes of charges defined in Section 100. Thus it is clear that such a charge does not require a suit to be brought for its enforcement under Order 34 Rule 14. There is also the further consideration that even if such a charge comes within the terms of Section. 100 of the Transfer of Property Act, in the absence of a decree having been obtained in satisfaction of a claim arising under the charge, which can only be after the creation of the change, there is no necessity for a suit under Section 67 of the Transfer of Property Act. We think after the coming into force of the Civil Procedure Code, it would be only complicating the case to refer to the state of the law when Section 99 of the Transfer of Property Act which the Courts struggled against and which is responsible for many anomalies, was in force. It is well known that the Select Committee on the Civil Procedure Code recommended a total repeal of the Section. The opinion of Pratt, J., if it had been accepted by Shah, J. would have again taken us back to the days when section 99 of the Transfer of Property Act was in force.

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[1] (1912) I. L. R. 40 Cal. 21.
[2] (1886) I. L. R. 13 Cal. 221.

Sitaramayya *v.* **Gopalakistnamma** : I. L. R. 43 Mad. 57.

Failure to comply with the provisions of S. 248 C. P. C. (O. 21 R. 22) cannot with propriety be called irregularity in the publishing or conducting of the sale within the meaning of S. 311 C. P. C. (Or. 21 to 90), see *Kumud Bewa* v. *Prasanna Kumar Roy* [1], *Parashram* v. *Balmukund* [2]. But the distinction between an application for execution and an application for a step-in-aid of a pending execution we think, is sound when the party sought to be proceeded against is the judgment-debtor himself. In that case, the application is not properly styled an application for execution. In the case of a legal representative, however the application even in those circumstances, would be a substantive application for execution contemplated by Article 50 Clause (1). The Privy

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1. (1912) I. L. R. 40 Cal. 45. 2. (1908) I. L. R. 32 Bom. 572.

Council case in *Raghunath Das* v. *Sundar Das Khetri* [1], was itself such a case. Though it is difficult to agree with the observations in this case pointing to a valid distinction as to execution application itself, between the judgment-debtor and his legal representative (their Lordships in *Raghunath Das* v. *Sundar Das Khetri* [1], seem to say that notice under S. 248 is the foundation of the jurisdiction to proceed), having regard to the considerations referred to above, we think the judgment is right.

Beeju v. Seed Moorthiya Saheb: I. L. R. 43 Mad. 214. F. B.

The question in this case was as to the nature of the lien of a Muhammadan widow in respect of her unpaid dower and the precise circumstances in which the lien would arise under the Muhammadan Law. It may not be a lien in the strict sense of the term and according to their Lordships of the Privy Council in Mussamut *Bebee Bachun* v. *Sheik Hamid Hossain* [2] it does not arise by the Muhammadan Law as a consequence of the gift of dower, but is founded on the power of the widow as a creditor for her dower debt to hold the property of her husband of which she has lawfully and without force or fraud obtained possession until her debt is satisfied with the liability to account to those entitled to the property subject to the claim for the profits received."

There does not seem to be any difference under the Muhammadan Law between the position of an ordinary creditor and the creditor for dower debt. In these circumstances, it would have been fairly arguable if the matter was *res integra* whether at all this lien can be justified any more than in the case of a creditor. The fact that marriage is one of the matters governed by Muhammadan Law cannot attract the application of the Muhammadan Law even in respect of the creditor's remedies. But in the face of the long catena of cases that line of argument would be obviously inadmissible. Then the only question is, what is meant by the expression "lawfully, without fraud or force." The Allahabad High Court in *Amanat-un-nissa* v. *Bashir-un-nissa* [3] thought that these words excluded all cases except those of consent express or implied of the heirs.

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1. (1914) I. L. R. 42 Cal. 72.
2. (1871) 14 M. I. A. 377.
3. (1894) I. L. R. 17 All. 77.

In *Mahomed Karim-ul-lah Khan* v. *Amani Begam*[1] they modified this view so far as to lay the onus of disproving such consent on the heirs. In *Ramzan Ali Khan* v. *Ashgari Begam* [2], the view taken in *Amanat-un-nissa Begam* v. *Bashir-un-nissa* [3] was dissented from as being inconsistent with *Mussammat Bebee Bachun* v. *Sheikh Hamid Hussain* [4]. It is clear that even under the ruling in *Amanat-un-nissa* v. *Bashir-un-nissa* [3] an agreement to create a charge or lien is not necessary. All that it says is that the widow cannot be said to be lawfully in possession unless she got into possession with the consent express or implied of the heirs. There is nothing to justify such a limitation either in the case-law on the subject or in the theoretical origin of the right.

The further question that arose in this case was whether she could transfer this right. Their Lordships hold she could. No doubt a transferee from the widow could not himself acquire the lien but the widow having acquired the lien there is no reason why it should not be transferred to the purchaser.

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[1] (1895) I. L. R. 17 All. 93.

[2] (1910) I. L R. 32 All. 563.

[3] (1895) I. L. R. 17 A. 77.

[4] (1871) I. L R. 14. M. I. A. 377.

Neelaveni v. Narayana Reddi. I. L. R. 43 Mad. 94 F. B.

This decision settles the conflict between the decisions of the Madras High Court as to the inherent power of the Court to set aside an *ex parte* decree for reasons other than those provided in O. 9 R. 13. This decision overrules the more liberal view taken in *Somayya* v. *Subbamma*[1], accepting the view taken in *Murugappa Chetty* v. *Rajasami*[2]. It may be premised however that the ruling applies only to simple cases *of default* and not to cases complicated by death. The whole procedure is inapplicable to cases where there is a non-appearance owing to the death of the party. (See I. L. R. 35 All. 331). Where a minor is involved and by the negligence of the guardian there is a default, the minor may apply for review or he may bring a suit to set aside the judgment but apparently this remedy is not open to him. The argument that appealed to the Full Bench was that applied by the Privy Council in connection with Section 11 of the Civil Procedure Code. "It is the essence of a Code to be exhaustive in the matters in respect of which it declares the law." *Gokul Mundur* v. *Pudmanund Singh*[3] The argument on the other side was that the section only lays down cases in which the Court is bound to set aside the judgment on default and does not purport to exhaustively state the circumstances in which the Court may set it aside. The corresponding English rule (Order 27 Rule 15) does not in any way circumscribe the discretion of the Court. Even so, it has been held that there is an inherent power in the court to set aside an *ex parte* judgment to prevent an abuse of its proceedings. There is nothing in the language of O. 9 R. 13 to show that the second part of the section exhausts the circumstances in which the Court may set aside the judgment on default. The first part which gives the party the right to apply is expressed in wide terms and contains no limitation as to the grounds which can be urged in such a petition. In fact, it is difficult to see why there should be any difference on this matter between English procedure and Indian. As to the point made that the Code must be presumed to be exhaustive, the case relied upon notwithstanding, it has been held by all the Courts including the Privy Council that the rule of *res judicata* is not confined to Section 13 old C. P. C. or the corresponding provision in the new Code. The section does not also purport to provide for all cases. On the other hand, it confines itself to stating the grounds for which the Court is bound to set aside the judgment without any discretion to refuse.

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[1] (1908) I. L. R. 26 Mad. 599. [2] (1912) 22 M. L. J. 284.

[3] (1902) I. L. R. 29 Cal. 707, P. C.

Venkatasastrulu *v.* **Seetharamudu,** I. L. R. 43 Mad. 166 P. C.

In this case, the question was whether the inam in dispute was an estate *i.e.,* to say whether it was a village of which the land revenue alone had been granted in inam to a person not owning the Kudivaram thereof. Their Lordships apply *Suryanarayana* v. *Patana* [1] and hold that there is no presumption that the grant was only of the melvaram. Relying upon the reference to cultivation and enjoyment in the deed and the later history of the inam which showed that the tenants had no occupancy rights and the fact that the lands were found to be waste their Lordships held that the grant must have been of not merely the revenue but also of the entire proprietary interest. The question to be considered in these cases according to their Lordships is whether the grant was of land revenue alone to a person not owning the permanent right of occupancy or whether it vested in the grantee the whole proprietary interest in the village. The mere fact that there were tenants on the land at the time of the grant would not do; you must show in addition that the tenants had permanent rights of occupancy. You may infer that they had none from the fact that the lands were waste or from the subsequent dealings on the footing of the absence of a Kudivaram right in the tenants.

Bhikabhai Muljibhai Patel *v.* **Panachand,** I.L.R. 43 Bom. 707.

The question decided in this case is that where a mortgage is executed by a person with the intention of defrauding the creditors and a part of the mortgage amount was money which the mortgagor owed to the mortgagee prior to the date of the mortgage and the mortgagee was aware of the intention of the mortgagor to defeat his creditors, whether the mortgage is good against the creditors at least to the extent of the original indebtedness of the mortgagor to the mortgagee. That the question is not an easy one will be evident from the conflict among various High Courts and among decisions of the same High Court. See *Rajani Kumar Das* v. *Gaur Kishore Shaha* [1], *Krishna Kumar Nandi* v. *Jai Krishna Nandi* [2], *China Pitchaiyah* v. *Pedakotiah* [3], *Soma Row* v. *Doraisami Chettiar* [4], *Bhikabhai Malji Chai Patel* v. *Panachand* [5]. There seems also to be conflict on this question in America. See Bigelow on Fraudulent Conveyance, pp. 466-468. If, however, the mortgage was executed by the mortgagor to the mortgagee for securing only those amounts for which there was a prior indebtedness, even though thereby other creditors might be defeated or delayed, the mortgage will be valid in its entirety against those other creditors, in the absence of a bankruptcy of the mortgagor. *Musahar Sahu* v. *Lala Hakum Lal* [6] *Minakumari Bibi* v. *Bijoy Singh Pudusia* [7]. If the whole amount of the mortgage money is not borrowed for the purpose of discharging prior indebtedness and the intention of the mortgagor is to convert the property into liquid assets and to remove a portion of the same from the reach of the creditors and the mortgagee participates in the transaction with the knowledge of that intention on the part of the mortgagor, the mortgage comes within the language of S. 53 of the Transfer of Property Act and is bad against the creditors. For this purpose there can be no difference between a mortgage and a sale, because both are transfers under the Act. It is settled that in the case of a sale fraudulent under the section, if a portion of the consideration is debts owed by the vendor to the vendee the vendee cannot have a charge for that amount, *Chidambaram Chettiar* v. *Srinivasa Sastriar* [8] because as the sale is bad, the parties are relegated to the rights which they had but for such sale. If however the vendee had a mortgage or a charge for any amount prior to the sale that might remain unaffected. It seems therefore to follow that if the mortgage is bad against the creditors, it cannot be good to any extent against them. If, however, under the mortgage the mortgagee had discharged a pre-existing mortgage or charge;

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[1] (1918) I.L.R. 41 Mad. 1012.

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1. (1908) I. L. R. 35 Cal. 1051,
2. (1915) 23 C. L. J. 570,
3. (1911) I. L. R. 36 Mad. 29,
4. (1912) 24 M. L. J. 266.
5. (1919) I. L. R. 43 Bom. 707.
6. (1915) I. L. R. 43 Cal. 521.
7. (1916) I. L. R. 44 Cal. 662.
8. (1914) I. L. R. 37 M. 227 (P. C.)

that might subsist in his favour on the principle of subrogation. The case in *Palamalai Mudaliar* v. *South Indian Export Company*[1] is explicable on this basis; and *Krishna Kumar Nandi* v. *Jai Krishna Nandi*[2] may also be supported on this footing. Again it cannot be asserted as a rule of law, unless the two portions of the consideration are separable and the mortgage is as it were two mortgages in the same document, the mortgage is valid as such for the original indebtedness. If therefore the mortgagee is not entitled as of right to a mortgage for the binding portion of the consideration, the question arises whether the Court when its aid is invoked to avoid such a transfer can impose terms on the creditors to satisfy the simple debt claims of the mortgagee which form part of the consideration of the mortgage. The right of the creditors in respect of fraudulent transfers embodied in 13 Eliz Ch. 5 and S. 53 of the Transfer of Property Act is a common law right in its origin and not a creation of equity. [It will be interesting to note here that S. 53 of the Transfer of Property Act is more or less declaratory of the Hindu and Mahommedan Laws on the question, as appears from an article in the Journal of Comparative Legislation for January 1920, page 136; and these laws are left unaffected so far as the Hindus and Mahommedans are concerned, by S. 2 of the Act.] So the creditors can, after signifying the avoidance by any overt Act ignore the sale or mortgage, and proceed to work out their rights against the property; and the Court cannot in such a proceeding impose terms on the creditors. The questions as to whether a suit to set aside a fraudulent alienation is necessary in every case and what the nature of the action is have been considered very fully in 31 M. L. J. (Journal) pages 1 and 23. It is possible that the plea may be taken in defence, though the Madras High Court has in some decisions, taken a different view in recent years. Assuming that the Court has power to impose terms, because the avoidance that is prayed for is an equitable relief, a simple creditor whose debt formed part of the consideration for the mortgage has no higher rights than the other creditors and there is no reason therefore why their rights should be postponed to his. Futher, the Courts will not impose terms in favour of a person who was a party to an attempt to defraud the creditors and who can therefore have no equity in his favour.

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[1] (1909) I.L.R. 33 M. 334

[2] (1915) 23 C. L. J. p. 570.

Afzal-un-nissa v. Abdul Karim: 47 Cal. p. 1.

There is no need for the guarded language used by their Lordships in this case for repelling the contention, that a permanent tenancy is a legal impossibility excepting in those provinces where there is a permanent settlement of Land Revenue by the Government. As their Lordships have observed, the matter is one between the landlord and tenant; and the position in a question with the Government would not alter the possibility of a bargain as between landlord and tenant. It is not necessary to refer to more authorities on the question than that of the Privy Council in the latest case of *Seturatnam Aiyar v. Venkatachella Goundan* [1]. There the question was as to the nature of the tenancy of the tenants' holdings under a ryotwari proprietor and their Lordships after a very full discussion of the subject both at their bar and in the judgment of the High Court under appeal reported in *Venkatachella Goundan* v. *Rangaratnam Aiyar* [2], affirm the permanent tenancy right in the tenant. There may be a difference as to the incidence of the burden of proof, between cases where the original of the tenancy is known and where its origin is not known. See *The Secretary of State for India in Council* v. *Lakshmeswara Singh* [3]. In provinces where there is no permanent settlement, it may also be ordinarily on the tenant, though he is a defendant in a suit in ejectment by the landlord when the latter's title to the land is admitted, to establish the permanent tenancy right that he claims. *Muna Mohamed Rowther* v. *Muthu Alaguppa Chettiar* [4], *Ponniah Nadan* v. *Deivanai Ammal* [5] and *Sethuratnam Aiyar* v. *Venkatachella Goundan* [1]. These considerations only go to support the view of the Privy Council, though expressed with great reserve.

Board of Revenue Madras v. Ramanathan Chetty: I. L. R. 43 Mad. 75 F. B.

Under S. 3 cl. (1) of the Income-tax Act, the income to be taxed under the Act must be the income accruing or arising or received in British India. S. 9 says that the tax shall be payable by an assessee under the head "income derived from business" in respect of any business carried on by him. It was contended for the Government that profits of a business outside British India belonging to a person in British India being in respect of a business carried on by him were liable to income tax in British India. It is a matter of considerable difficulty as to what exactly the words "arising or accruing or received" mean and it is not quite clear that all incomes are assessable on receipt or accrual and also as to which of them are assessable on receipt and which on accrual. For instance, S. 6 speaks of receipt of salary apparently suggesting that that is the essential prerequisite of liability while S. 7 speaks of "interest receivable" as being liable. S. 8 speaks of liability for tax on the annual value without indicating whether liability is excluded if no income is made by the house being vacant. The old S. 21 made foreign principals liable for income-tax only on receipt of the income by the agent. The present section (S. 33) makes the necessary amendments by adding the words " arising or accruing" to bring the section more completely within the scheme of the Act. S. 31 however remains unaltered though the intention could not be that the minors should not be liable for income-tax in respect of income which has arisen but has not been received. As S. 3 contains the saving clause " save as hereinafter provided," one can by no means be sure that the test applied by that section is conclusive as to any matter referred to therein. But having regard to the long practice acquiesced in by the Legislature and the rule of construction in favour of the subject referred to by Mr. Justice Seshagiri Aiyar we think that their Lordships did right in upholding that practice against the recent departure.

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[1] (1919) 47 I. A. 76.
[2] (1913) 24 M. L. J. p. 571.
[3] (1889) 16 Cal. p. 223.
[4] (1917) 34 M. L. J. 284.
[5] (1918) 36 M. L. J. 463.

Veyindramuthu Pillai *v.* Mayanadan: I. L. R. 43 Mad. 107 (F. B.)

In *Prosunna Kumar Sanyal* v. *Kali Das Sanyal*[1] it was laid down by the Judicial Committee that a question arising between the parties or their representatives in regard to the execution, discharge or satisfaction of a decree does not cease to be such by reason of the fact that a stranger also is interested therein. On that ground their Lordships held that a suit will not lie to set aside a court-sale on the ground of fraud although the purchaser was a stranger. This aspect of the case has been overlooked in several cases and attention was mainly concentrated on the question whether the persons disputing came within the designation of "*parties and their representatives.*" This was pointed out in *Nadamuni* v. *Veerbhadra* [1] by Wallis and Krishnaswamy Iyer, JJ., and is now authoritatively laid down by the Full Bench. On the other question much canvassed in the case as to whether the auction-purchaser in execution of a money-decree is a representative of the judgment-debtor or of the decree-holder, there is a considerable conflict. But the conflict does not cover as wide a ground as it might at first sight appear. The question might arise in different connections. Now suppose a suit is brought to recover specific immoveable property and pending the suit the property is sold and purchased by a stranger in execution of a money-decree. There is no conflict at all but that the purchaser would be a person bound by *lis pendens* and is a representative. The same would be the case in a suit on a mortgage. That is one matter on which there is no conflict. Again take the case of a property which is privately sold after it is attached. The Courts are agreed that such a purchaser is a representative of the judgment-debtor and all questions between the purchaser and the decree-holder must be decided in execution. On this point also there is no conflict. Take another position. Property is purchased in execution of money-decree by a stranger. The purchaser applies for possession. All the Courts are agreed that the matter is not one coming within S. 47. It cannot be said that this is so because the question is not one relating to execution for the Madras cases have consistently held that if the purchaser is the decree-holder the matter falls within S. 47. The conflict will be found on analysis to be really centred round a very small point namely as to whether when disputes arise between the auction-purchaser in execution of the money-decree and the judgment-debtor or decree-holder in that very suit you could consider the purchaser as the representative of the one or the other. The suggestion of Mr. Justice Abdur Rahim is that he might be treated as the representative of the one of the other according as the nature of the question requires him to be so treated. There is some justification for this view. Now suppose a claim is put in and disallowed and the property is sold. If this view is not taken the claimant may urge the objection again when the auction-purchaser proceeds to take possession of the property though the time to bring a suit to set aside the order on the claim might be barred. If the scope of S. 47 is carefully delimited in point of the subject-matter of the questions, by confining it to questions relating to execution, discharge or satisfaction of the decree that is to say, to questions which if decided in one way or the other might lead to the closing, re-opening or furthering of the execution of the decree. Such a decision would afford a convenient solution for many difficult questions. But if the scope of S. 47 is not so carefully delimited but extended so as to cover all questions relating to the rights of the parties under the decree there is the danger of bringing in many extraneous matters within the purview of the section and upsetting the course of decisions in many directions. So far as mortgage-decrees are concerned the view is that the purchaser takes the interest which the mortgagor and the mortgagee conjointly convey so that the purchaser would be the representative of both the mortgagor and the mortgagee and there is the very greatest difficulty in deciding questions of *lis pendens* on that basis in suits upon several mortgages on the same land. Mr. Justice Srinivasa Aiyangar in *Chinna Pillai* v. *Venkatasamy Chetty* [1] suggests a method of determination of that question which might be of service in the solution of the questions under S. 47 also. We think that in all cases in which the rule of *lis pendens* applies the party bound should be held to be the representative of one of the parties to the suit *qua* the interest in respect of which he is bound.

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[1] (1892) I. L. R. 19 Cal. 688.

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[1] (1910) 34 Mad. 417.

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[1] (1915) I. L. R. 40 M. 77.

[2] (1919) I. L. R. 43 M. 182.

Raja Jagaveera Rama Venkateswara Ettappa v. Arumugam Chetty. I. L. R. 43 Mad. 174 P. C.

In this case for a long course of years, so far back as could be traced, the tenants were paying a dry rate of four fanams. From that fact their Lordships say a contract to hold the lands at a four fanam rate might be implied and such a contract when taken in conjunction with the terms of the ryoti tenure, implies that the tenant is entitled to hold, at least as long as circumstances affecting the holding remain unchanged, otherwise than by the labour and outlay of the ryot himself. It, however, appeared that for periods varying from two to twenty years before suit the tenants were paying for Vanpayir crops at the rate of 8 fanams though the crops were raised by the tenants with the water of wells dug by themselves. The case that the original contract itself was that the tenants should pay a higher rate in case the crop was changed had not been set up nor was there anything to show that there was an original *varam* prevailing in the village into which the money rates were commuted. From the fact of payment, the District Judge inferred an agreement to pay eight fanams and their Lordships say that this inference might be justified but that there was no justification for his further finding as to consideration for the agreement. In the absence of consideration, the agreement would be mere *nudum pactum* and unenforceable. The letting of the land by the landlord would not do for it was let at the dry rate already and the ryot was entitled to continue in occupation at that rate and no fresh consideration therefore moved from the landlord for the ryot's assumed promise to pay at eight fanams rate. The District Judge found consideration in the landlord's abstention from exercising his right to resort to varam. But the implied contract to pay the four fanam rate was a bar to such a resort and even if it was not, there was no proof of such pre-existing varam. Nor could a valid consideration be found in the zemindar's submission not to press a hopeless and groundless dispute anymore than a promise to pay a sovereign in satisfaction of a debt of a guinea is supportable by the consideration that it saves the creditor the trouble of bringing an undefended action. To the argument that there might have been an original contract to pay an enhanced rent in the altered circumstances their Lordships say this: "Furthermore such a theory if applicable at all, is of general application and repugnant to the whole scheme of Act VIII of 1865 which is based on the idea of making the contract paramount even when it is only implied and of recognising agreed rents in supersession of division of the produce which is to be resorted to only if no contract for a rent can be proved and if the fixing of the rent according to the local rate be objected to." Their Lordships also refer to the improbability of the tenant consenting voluntarily to payment of enhanced rents when his own outlay has improved the return. These observations of their Lordships do not seem to be adverted to in the judgment of the learned Chief Justice in *Periakaruppa Mukkandan* v. *Raja Rajeswara Sethupathi* [1]. Their Lordships however indicate that if a distinction had been drawn between cases where the higher rate was paid for forty years and cases where it was only paid once or twice, if the possibility of presuming a lost patta at eight fanams or lost proof of consideration had been mooted and the terms of the original contracts had been fully discussed, other questions might possibly have arisen. The subject of this reservation has been considered elaborately in *Periakaruppa* v. *Raja Rajeswara Setupathi* and the somewhat cryptical answer has been returned that if long payment is the sole fact, a valid contract to pay the higher rate can be inferred from such payment alone but as that happy state of things cannot normally be expected to exist, the Court has to take that circumstance along with other circumstances and draw its own inference of fact. As a question of fact, the inclination of the majority of the Judges would seem to be against drawing the inference of a valid contract ordinarily.

Muthukorakki Chetty *v.* **Madar Ammal**, I. L. R. 43 Mad. 185 F. B.

In this case, the facts were: After a court sale was confirmed, an application was put in by the judgment-debtors to set aside the sale. Though the application was out of time, it was admitted by the Court and the sale was set aside so far as the

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1. (1918) I. L. R. 42 Mad. 475 F. B.

interests of some of the judgment-debtors were concerned. Within three years of the final order of the Court, but more than three years from the date of the orginal confirmation, the purchaser (who was the decree-holder) applied for delivery of possession. The question was whether his application was barred. Two questions that were considered were (i) whether the cause of action for the application which accrued on the first confirmation was suspended by reason of the proceedings to set aside the sale ; secondly whether it could be said that fresh cause of action arose on the date of the second order. The majority are disinclined to hold that the limitation was suspended by reason of the proceedings. Sadasiva Aiyar, J., is inclined to hold that it was. On the second question the majority were of opinion that the cause of action arose on the date of the fresh order. The judgment of the Privy Council in, *Baijnath Sahai* v. *Rampal Singh* 1 seems to be fairly a case *ad idem* and their Lordships follow it. In that case, notwithstanding the proceedings taken to impeach a sale before the Board were *ultra vires,* their Lordships held that the sale cannot be said to have been absolute till final orders were passed in those proceedings. We think with Seshagiri Aiyar, J., that the only principle that can be gathered from the various judgments of the Privy Council is that the Courts should so construe the first and the third clauses of the various articles as to give effect as much as possible to the principle that a man should not be made to resort to court when proceedings are pending impeaching his title.

In certain circumstances, a new cause of action either based on the right to restitution, or on the basis of new rights on failure of consideration may arise. In others like the one in hand, cause of action may be dated later. If all the parties *bona fide* thought that the sale had not become absolute, the court is not bound to consider in its view of strict law that the same has already become absolute. The present case, as the learned Officiating Chief Justice points out, was a much stronger case than the Privy Council case in *Baijnath Sahai* v. *Ramphal Singh* 1, *Mussammat Ranee Surno Moyee* v. *Shoshee Mokhee Bornia* 2, *Rangayya Appa Rao* v. *Bobba Sri-*

(1896) I. L. R. 23 Cal 775. 2. (1868) 12 M. I. A. 244.

ramulu 1, *Bassu Kuar* v. *Dhum Singh* 2, *Ashfaq Hussain* v. *Gawri Sahai* 3, *Amma Bibi* v. *Udit Narain Misr* 4 are cases in which the Privy Council gave a liberal, even strained interpretation to the articles of the Limitation Act to give effect to this principle. In *Soni Ram* v. *Kanahaiyalal* 5, *Mani Singh Mandhatha* v. *Nawab Bahadur of Murshidabad* 6, the Privy Council thought that it was not possible to infer a new cause of action; a tendency in favour of a more rigorous construction it may even be said, is noticeable in these cases. On the other hand, *Nrityamoni Dasi* v. *Lakhan Chandra Sen* 7 (unless the case is interpreted away as one based on S. 14 of the Limitation Act though neither the Privy Council nor the Courts in India refer to that section and the latter expressly base the decision on the principle that during *bona-fide* litigation as regards the same rights limitation is suspended) affords an instance where the Privy Council upholds the principle. The attempt made by Mr. Justice Oldfield to explain away the decisions of the Privy Council only confirms the necessity for a rule of suspension in some cases or at least for some such rule of interpretation as has found favour with Mr. Justice Seshagiri Aiyar. His Lordship has failed to take note of the circumstance that in *Baijnath Sahai* v. *Rampal Singh* 8 the proceedings being *ultra vires* in a strict view of the limitation articles, should be treated as non-existent and could not affect the question of limitation.

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1. (1904) I. L. R. 27 Mad. 148
2. (1889) I. L. R. 11 All. 47.
3. (1911) I. L. R. 33 All. 264,
4. (1909) I. L. R. 31 All. 68.
5. (1913) I. L. R. 35 All. 227 P. C.
6. (1919) I. L. R. 46 Cal. 694 P. C.
7. (1916) I. L. R. 43 Cal. 660 (P. C.)
8. (1896) I. L. R. 23 C 775.

Besant v. Advocate General of Madras. I. L. R. 43 Mad. 147 P. C.

This important decision of their Lordships lays down the following propositions:—

(1) The order of the Presidency Magistrate calling for or dispensing with security is a mere administrative act.

(2) The proceedings are not criminal and as such not revisable under S. 435 of the Criminal Procedure Code.

(3) Though the High Court of Madras has power to issue a writ of *certiorari,* it is excluded by express provision of the statute which provides that no civil or criminal proceeding shall lie to question acts done in good faith under the Act.

(4) The Presidency Magistrate's power under the Act is not exhausted so soon as he makes an order dispensing with security and he can subsequently recall the order.

(5) Neither the Press Act nor Section 22 thereof is *ultra vires* of the Indian legislature.

The other observations of the Privy Council are on the construction of Section 4 of the Act. They illustrate the very comprehensive character of the provisions, but do not add to the elucidation of the section or mitigate the rigor of the literal interpretation of the section. Having regard to the wide language of the section and the limited scope of the proviso (which according to their Lordships is really not a proviso at all) the balancing of political considerations to which their Lordships refer is far from being substantial.

Louis Dreyfus and Co., *v.* **Prushottam Das Narain Das.** I.L.R. 47 Cal 29.

There can be no doubt that unless one of the parties to the arbitration withdraws from it or otherwise declares unambiguously that he is not bound by the reference, the arbitrators are under a duty to give notice of meetings to all the parties before they can pass a valid award binding on the absent parties. Though the strict rules of the Civil Procedure Code may not apply to arbitrations, this requirement of notice is only a rule of natural justice that no person can be condemned unheard.

There is a dictum in this case laying down that there can be a binding award against a firm though notice was served on some only of the partners and even when the names of the other partners might not have been disclosed in the arbitration. On this qustion the learned Judge differs from the opinion of Fletcher, J., in *Hurdwary Mull* v. *Ahmed Musaji Salaji* [1]. The decision of Fletcher, J., was passed when the old Code of Civil Procedure was in force and the procedure prescribed in Order 30 of the New Code had not been introduced regarding suits by or against firms. The only procedure then available was to sue all the partners. If this was the case with regard to suits, cases of arbitration would not stand on a different footing; and to bind the firm, the arbitration had to proceed against all the partners. After the coming into force of the Civil Procedure Code of 1908, suits by or against a firm can be instituted without impleading all the partners. It is doubtful and there is no authority on the point so far as we are aware of the applicability of Order 30 or the corresponding O. 48 A of the Rules of the Supreme Court to the cases of arbitration regarding partnership, except an observation of Chaudhuri, J., in *Ghaznavi and Co.* v. *Budge Budge Jute Mills* [2]. A partnership being merely a compendious name for the partners composing it, it is difficult to see how an arbitration purporting to be against a number of persons, but to which only some are parties in fact, will be binding on all of them. Again as the rules of Order 30 do not apply by their own force to arbitration it is not easy to see how the provisions as to the appearance and disclosure of the names of partners can be insisted on in arbitrations. In the absence of a statutory provision, that a valid award can be made against a firm in an arbitration in the firm's name to which only some of the partners are parties, it may be urged that the procedure would be repugnant to the rule of natural justice that no order to the prejudice of a person can be passed without notice to him. The disclosing of the partners' names after the decree is by no means an effective remedy to the partner who had no notice in the course of arbitration. Though there is convenience in the procedure approved by Rankin, J., we do not think the case is by any means clear in favour of his view.

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[1] (1908) 13 C. W. N. 63.

[2] (1914) 25 I. C. 955.

Umesh Chandra Dutt v. Bibhuti Bhusan Pal Chowdhury. I. L. R. 47 Cal. 67.

The language of the learned Judges in this case is open to misconception. All that they meant to decide was that though there may be an appeal from a decree, so far as it relates to costs the Appellate Court ought not to interfere with the decree as to costs unless it involved a question of principle. There are also prior cases in which similar language is used. All those cases have only to be understood as laying down the law as we have mentioned. On the other hand, if they are supposed to have held that an appeal on a question of costs in an appealable order or decree is incompetent unless some question of principle is involved, they will be opposed to the provisions of the Code of Civil Procedure and the view of the law expounded by Sir Barnes Peacock and the other members of the Full Bench in the leading case of *Greedharee Lal Roy* v. *Soonder Bibee* [1] and the cases following it. Though that case was decided when the Code of 1859 was in force, that view is only strengthened by the terms of O. 20 R. 6 (2) of the present Code which provides that the award of costs has to be embodied in the decree. Once the award of costs becomes part of the decree there is no restriction imposed on the right to appeal conferred by S. 96. It may be interesting to notice here that the select committee on the new Civil Procedure Code wanted to restrict the right of appeal in the matter of costs by introducing specific provisions but this was not accepted. Fletcher, J., himself in the case of *Saradindu Mukerjee* v. *Charu Chandra Dutt* [2] uses unmistakable language which goes to show that there is a right of appeal but that the Appellate Court will not interfere with the discretion of the lower Court in the matter of costs, except where a question of principle is wrongly decided.

Srinivasadas Lakshmi Narayan v. Ramachandra Ramrattan Das. 44 Bom. 6.

This case is of more than passing interest. Here an attempt was made by Beaman, J., sitting as trial Judge to introduce a new head of public policy for India based on the policy and the executive measures of the Government. Incidentally he laid down a number of propositions on the question of public policy many of which are open to question and are more or less at variance with the exposition of the subject in the leading English cases which he considered inapplicable to Indian conditions. When the case went up on appeal, this view of the law on the subject was overruled by Scott, C. J., and Hayward, J., who pointed out forcibly the dangers underlying the creation of new heads of public policy for India in the same terms in which English Judges have done in the leading cases which have been collected in the judgment of Hayward, J. If the policy of the Government on the question of currency in India were intended to interfere with the private contracts of parties, nothing can be easier for the Government than issuing a notification as they did in 1918 or to have legislated on the matter rendering all such contracts illegal within the terms of S. 23 of the Contract. To rely on vague and uudefined heads of public policy would only throw law in a state of confusion and the English precedents which deprecate the enlargement of heads of public policy do, we think, apply with equal force to Indian conditions.

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[1] B. L. R. Sup. Vol. 456; S. C. 6 W. R. 18.

[2] (1917) 22 C. W. N. 872.

[*End of Vol.* XXXVIII]

NOTES OF RECENT CASES.

Chief Justice and Krishnan, JJ. *1920 January 5.* A. S. No. 370 of 1918.

Limitation Act, Art. 60 *and* 63.—*Nattukkottai Chetty firm—Money deposited at 2 month's thavanai—Accrual of interest—Suit for recovery of money—Limitation—Hindu Law—Investments by husband—Income allowed to accumulate along with corpus—Accretion to husband's estate.*

Where money is deposited with a Nattukkottai Chetty shop at 2 month's *thavanai,* the interest for that period should be added on to the principal so as to make both the amounts a deposit. Art. 60 of the Limitation Act and not Art. 63 applies to a suit for the recovery of the money. *Muthiah Chettiar* v. *Ramanathan Chettiar* [1] referred to.

Where the income accruing from investments made by her deceased husband, is allowed by a Hindu widow to accumulate along with the principal and she did not deal with the income in her life-time as her own, the presumption is that the income is also part of the husband's estate. *Isri Dutt* v. *Hansbutti* [2] relied on.

G. Krishnaswami Iyer, for Appellant.

T. V. Muthukrishna Iyer and *N. Muthuswami Iyer,* for Respondent.

The Chief Justice and Krishnan, J. *1920 January 7.* S. R. No. 12758 of 1919.

Practice—Pleader's fee—Appeal dismissed as being presented out of time—Respondent's fees.

Their Lordships dismissed a regular appeal presented out of time on the ground that there was no sufficient cause for excusing the delay in presentation and allowed one-fourth of the regulation fees to the respondent's pleader who appeared on notice.

K. Rajah Iyer, for Appellant.

T. R. Venkatarama Sastri, for Respondent.

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[1] (1917) 7 L. W. 330.

[2] (1883) I. L. R. 10 C. 324 P. C.

Chief Justice
and Krishnan, JJ.
1920, January 8.

A. S. No. 167 of 1919.

Hindu Law—Joint Family—Father—Testamentary provision for maintenance of his widow, if valid.

Where a Hindu father disposes by will of ancestral property, the disposition is inoperative as against his son, even though the disposition is in the nature of a reasonable provision for the maintenance of the testator's widow.

Quaere: Whether the consent of the son, if an adult, or of his mother if a minor, would validate the disposition ?

Lakshmi v. *Subrahmanya* [1] followed.

Patrachariar v. *Srinivasachriar* [2] distinguished.

A. Krishnaswami Iyer and *B. Somayya*, for Appellant.

T. M. Krishnaswami Iyer for *S. Varadachriar* (*C. Srinivasa Iyengar* with him), for Respondent.

The Chief Justice
Oldfield and
Seshagiri Iyer, JJ.
1920, January 19.

Ref. Case No. 3 of 1919.

Stamp Act (II of 1899) Ss. 5, 6 and 57—Sale-deed—Indemnity clauses hypothecating other property—Stampduty.

A document styled a sale-deed and conveying certain lands contained a clause by which the vendor hypothecated some of his other properties as security to indemnify the vendee against any loss that might accrue to him on account of prior incumbrances etc. On a question arising as to the stamp duty payable on the document.

Held, that the instrument did not comprise or relate to several distinct matters within the meaning of S. 5 of the Stamp Act and was chargeable as one transaction under S. 6 with the higher duty.

Govindan Nambudiri v. *Moidin* [3] not followed.

Reference by the Board of Revenue [4], relied on.

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[1] (1889) I. L. R. 12 M. 490, 492.

[2] (1917) I. L. R. 40 M. 1122.

[3] (1917) I. L. R. 41 M. 469.

[4] (1876) I. L. R. 1 M. 138.

Ayling and Coutts
Trotter, JJ.
1920 January, 22.

Crl. Rev. Case. 711 of 1919.

Workman's Breach of Contract Act—Prosecution under the Act if a Criminal proceeding within S. 211 I. P. C.

A prosecution of a workman or labourer under S. 1 of the Workman's Breach of Contract Act is not a criminal proceeding within S. 211 I. P. C. so as to render the prosecutor liable to charge under the latter section.

B. Sitarama Row for petitioner

V. L. Ethiraj for the Public Prosecutor.

Wallis C.J. Oldfield and
Seshagiri Iyer, JJ.
1920, January. 27.

A. S. No. 190 of 1917.

Transfer of Property Act S. 82—Purchase by mortgagee at auction of portion of the mortgaged property—Effect of such purchase in reducing the mortgage debt.

Where a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears to the value of the whole of the property comprised in the mortgage. The mortgagee purchaser in such a case need not account to the mortgagor for the full market value of the property purchased.

Nand Kishore v. *Raja Hariraj Singh* [1] not followed. *Sami Row Appa* v. *Kuppusami Iyengar* [2] overruled. *Bisheshur Dial* v. *Ram Sarup*[3] Relied on.

The Hon. The Advocate General. for appellant.

K. Bhashyam. for respondent.

Wallis C. J. and
Krishnan, J.
1920 January, 28.

C. M. P. 187 of 1920.
in
A. S. 176 of 1919.

Limitation Act S. 12 (2)—Time taken in obtaining copies by party other than the appellant—Deduction of.

An appeal was filed in the High Court by the defendant with copies of judgment and decree obtained by another co-defendant against whom the suit had been dismissed. The appellant himself had applied for copy of the judgment and decree but the application had been dismissed and he took no further steps for obtaining copies.

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[1] (1897) I. L. R. 20 A. 23.

[2] (1911) 2 M. W. N. 342.

[3] (1900) I. L. R. 22 A. 284.

Held that though the copies of the judgment and decree filed along with the appeal were not applied for by the appellant, we could deduct the time spent in obtaining them under S. 12 (2) of the Limitation Act.

L. A. Govindaraghava Iyer for petitioner.

G. *Krishnaswami Iyer* for respondent.

Sadasiva Iyer &
Spencer JJ
1920 January, 29.

S. A. 2020 of 1918.

Malabar Law—Karnavan—Assignment of decree in favour of tarwad—Fraudulent intention—Assignee not affected.

The Karnavan of a Malabar tarwad has absolute right to assign a decree for money obtained by the tarwad against a stranger and the assignee of the decree is not in any way affected by any fraudulent intentions of the karnavan in making the assignment.

C. V. *Anantakrishna Iyer* for appellant.

C. *Madhavan Nair* for respondent.

Sadasiva Iyer &
Spencer JJ.
1920 February, 3.

S. A. 426 of 1919

Provincial Insolvency Act, S. *16 (5)—Mortgage—Adjudication of mortgagor as insolvent—Suit on mortgage without inpleading Official Receiver as party—Effect of.*

Where a mortgagor was adjudicated an insolvent and the mortgagee brought a suit on the mortgage without inpleading the Official Receiver as a party, and obtained a decree, *Held* that the decree was void and unenforceable.

C. V. *Ananthakrishna Irer* for appellant.

T. M. Ramaswami Iyer for respondent.

Abdur Rahim and
Krishnan JJ.
1920 February, 5.

S. A. 289 of 1919.

Negotiable Instruments Act S. *64—Stamp Act S. 19—Bill or note—Presentment—What constitutes.*

The presentment for payment of a bill or note for payment means that the instrument must be actually produced so as to enable the person presenting to give it up if paid. A registered notice by a pleader demanding payment is not a presentment in law. 22 M. 337; 8 M. L. J. 182 relied on.

K. R. Narayanaswami Iyer for appellant.

T. R. Srinivasarajagopala Iyengar for respondent.

Oldfield and Sesha-
giri Iyer, JJ.
1920 February, 4.

C. M. A. 263 of 1918.

Civil Procedure Code, S. 21—Principle of, if applicable to execution proceedings—Court executing decree if can question jurisdiction of court passing the decree.

The following questions were referred to a Full Bench :—

(1) Whether S. 21 of the Civil Procedure Code or the principle underlying that section is applicable to execution proceedings ?

(2) Whether a court executing a decree can question the jurisdiction of the court which passed the decree?

T. Ramaswami Iyer, for Appellant.

C. V. Ananthakrishna Iyer, for Respondent.

Sadasiva Iyer
& Spencer, JJ.
1920 February, 5.

S. A. 504 of 1919.

Transfer of Property Act, S. 53—Fraudulent transfer—Plea of, if could be set up as a defence to a suit under O. 21 R. C. P. 63 Code.

Their lordships referred the following question to a Full Bench :—

In a suit by an alienee to set aside an adverse order passed against him in claim proceedings, is it open to the attaching decree holder to plead in defence the fraudulent character of the alienation ?

K. Bhashyam and *V. K. Srinivasa Iyengar,* for Appellant.

E. S. Chidambaram Pillai and P. N. Marthandan, for Respondent.

Chief Justice,
Ayling and Coutts
Trotter, JJ.
1920 February, 20.

Full Bench.
Crl. Rev. Case, 677 of 1919.

Cr. P. C. S. 350 (1) *Proviso (a)—Applicability to proceeding under S. 107—S. 117* (2) *Effect—Proceeding under S. 107 if a "trial,"*

S. 350 (1) Proviso (a) Criminal Procedure Code, applies to a case under S. 107 of the Code.

Per Chief Justice :—A proceeding under S. 107 of the Code is a "trial."

Per Ayling and Coutts Trotter, JJ. :—By virtue of the provisions of S. 117 (2) of the Code, proviso (a) to S. 350 (1) is attracted to a proceeding under S. 107.

A. S. Viswanathaiyar Vakil, for Petitioners.

Public Prosecutor, Contra.

Chief Justice &
Krishnan, JJ.
1920 February, 23.

O. S. A. 56 of 1918.

Receiver—Appointment—Jurisdiction—Property which Court can attach in execution of Receiver in respect of—Appointment—Power of court.

In view of the change of language in O. 40 R. 1 of the Code an executing court has jurisdiction to appoint a Receiver in respect of property which it can attach in execution of a decree.

C. V. Anantakrishnier and *M. Subbarayar*, for Appellant.

V. V. Srinivasaiyangar and *Raja Aiyar*, for Respondent.

The Chief Justice,
Oldfield & Seshagiri
Aiyar, JJ.
1920 February, 3.

L. P. A. 31 of 1919.

Lessor and lessee—Covenant against alienation—Breach—No provision for re-entry as on a forfeiture—Effect of.

A lease contained a clause against alienation by the lessee but there was no provision for re-entry by the lessor on breach of the condition. The lessee assigned his interest and the lessor brought the lease-hold interest to sale in execution of a decree for arrears of rent from the lessee before the assignment. *Held,* that the lessor was not entitled to bring the lease-hold interest to sale and that the assignee of lease-hold interest was entitled to continue in possession.

K. P. Lakshmana Row, for Appellant.

C. V. Ananthakrishna Aiyar, for Respondent.

The Chief Justice,
Oldfield & Seshagiri
Aiyar, JJ.
1920 February, 23.

C. R. P. No. 155 of 1919.

Provincial Small Causes Courts Act, S. 17—Exparte decree—Application to set aside—Deposit of decree amount, if mandatory.

The proviso to S. 17 of the Prov. Sm. C. C. Act, is mandatory and the deposit of security must be made or given within the period of limitation prescribed for an application to set aside an *ex parte* decree.

I. L. R. 13 M. 178 overruled.

I. L. R. 32 C. 339 relied on.

T. M. Krishnaswamier, for Petitioner.

C. Madhavan Nair, for Respondent.

The Chief Justice
and Krishnan, J.
1920 February, 24.

A. S. No. 416 of 1918.

Registration Act, Ss. 17 and 49—Partition deed—Properties situate in British India and Travancore—Deed registered in Travancore but not in British India—Admissibility in evidence.

A partition deed among persons owning properties in British India and Travancore and affecting the properties in both places, is inadmissible in evidence as regards the properties in British India if the deed is not registered in British India. The fact that the deed is registered in Travancore and effects a severance as regards the properties in Travancore does not make it admissible in evidence in the Courts of British India as regards the properties situate in British India.

Hon. Mr. T. R. Ramachandra Aiyar and N. A. Krishna Aiyar for Appellant.

C. V. Ananthakrishna Aiyar, for Respondent.

Ayling and Coutts
Trotter, JJ.
1920 February, 25.

S. A. No. 672 of 1919.

Hindu Law—Adoption—Dancing girl—Intention to bring up adoptee for purposes of prostitution—Effect of.

An adoption of a girl by a dancing woman with the intention of bringing up the adoptee for purposes of prostitution is illegal.

T. R. Venkatrama Sastri, for Appellant.

T. M. Krishnaswamier, for Respondent.

The Chief Justice &
Krishnan, J.
1920 March, 2.

O. S. A. No. 14 of 1919.

Inherent Power—Erroneous Garnishee order—Power to set aside—Civil Procedure Code—S. 73—Applicability—Attachment in execution of assets of deceased Mahomedan—Creditors of father obtaining decree against such assets—Creditors of son obtaining decree against him—Rights of—Priority of claims.

A Court has inherent jurisdiction to set aside a Garnishee order passed by it under a misapprehension of facts and to direct the fine paid out in pursuance of the order to be brought back into court.

Where the assets of a deceased Mahomedan are attached in execution of decrees obtained by creditors of the deceased against such assets and by creditors of the son who had obtained decrees against him personally, the creditors of the father are, under S. 73 Civil Procedure Code entitled to be paid in preference to those of the son.

C. V. Ananthakrishna Aiyar and *S. Duraiswami Aiyar*, for Appellants.

T. R. Venkatarama Sastriar, T. G. Raghavachariar, and *P. Venkataramana Rao* for Respondents.

Abdur Rahim and Moore, JJ.
1920, February, 27.

A. S. No. 265 of 1919.

Grant—Construction—Grant to deity of temple—Provision in deed of grant for performance of pooja by archakas and for enjoyment of lands by them—Effect—Right of archakas to surplus income—English law—Applicability to construction of grant.

Where a deed of grant of lands, purporting to be in favour of the deity of a temple, provided that the then Archaka of a temple should live happily, cultivating the lands and enjoying the same from son to grandson etc., as long as the Sun and Moon last and performing the daily pooja and offerings to the deity, *held*, that the deed evidenced an absolute grant to the deity and that the hereditary archakas of the temple were not entitled to the beneficial enjoyment of the surplus profits of the lands.

English decisions construing grants purporting to be in favour a trustee and providing for the performance of certain charitable objects out of the property granted as grants under which the donee is entitled to the surplus income, do not apply to a grant of the kind in question.

A. Krishnaswami Aiyar and *M. Patanjali Sastri*, for Appellant.

P. R. Ganapathi Aiyar for *V. Ramadoss*, for Respondent.

Abdur Rahim and Moore, JJ.
1920, February, 27.

A. S. No. 199 of 1918.

Transfer of Property Act, S. 70—Mortgage security—Accession to—Prior and subsequent mortgages—Purchase by prior mortgagee and improvement of mortgaged property by him—Effect on rights of parties—Suit by puisne mortgagee against prior mortgagee purchaser—Accounts—Proper decree to be passed.

Where a prior mortgagee of property purchased the same from the mortgagor and erected a valuable building thereon without notice of the existence of the puisne encumbrance upon the property, *held*, in a suit by the puisne mortgagee to enforce his mortgage, that he was under S. 70 of the T. P. Act, entitled to treat the building as an accession to his mortgage security. *Held*, further, that the prior mortgagee was entitled to payment only of the amount due under his mortgage with interest up to the date of his purchase but was not entitled to any compensation for the improvement effected by him.

A. Krishnaswami Aiyar, for Appellant.

P. Nagabhushanam, for Respondent.

N. R. C. 5.

Oldfield and
Seshagiri Aiyar, JJ.
1920, March, 2.

C. M. A. No. 90 of 1919.

Hindu Law—Widow — Suit for — Maintenance decree creating charge—Prior money decree against surviving co-parcener and attachment before judgment therein—Sale in execution of prior decree and purchase by decree-holder himself—Rights under purchase—Effect on rights of widow.

In a suit for the recovery of a debt brought against a Hindu, the widow of his son being added as a party defendant, family property was attached before judgment and a decree was passed against the father-in-law. Subsequent to the date of that decree, the daughter-in-law sued for and obtained a decree charging her maintenance upon the same property. The first decree-holder executed his decree, had the property sold, the sale proclamation notifying the decree in favour of the daughter-in-law, and purchased the property himself.

Held, that his purchase was subject to the charge for maintenance in favour of the daughter-in-law and that she was entitled to proceed against the property in execution of her decree.

S. *Doraiswami Aiyar* and *A. Raghunatha Rao,* for Appellant.

S. *T. Srinivasagopalachariar,* for Respondent.

Abdur Rahim and
Phillips, JJ.
1920, March, 2.

A. S No. 177 of 1919.

Land Acquisition Act—Compensation—Assessment—Principles—Land used as private road but not dedicated as public road—Compensation if payable in respect of.

Under the land Acquisition Act compensation is payable in respect of land used as a private road but not dedicated as a public road. Principles on which compensation ought to be assessed discussed.

P. Doraiswami Aiyangar, for Appellant.

S. Doraiswami Aiyar, for Respondent.

Sadasiva Aiyar and
Spencer, JJ. — S. A. No. 720 of 1919.
1920 March, 9.

Hindu Law—Partition—Suit for—Maintainability—Suit on behalf of minor against his father when maintainable.

A suit for partition on behalf of a Hindu minor against his father is maintainable only under circumstances which will disentitle the father to the guardianship of the minor.

C. V. Ananthakrishna Aiyar, for Appellant.

T. R. Venkatrama Sastri, E. S. Chidambaram Pillai and *P. N. Marthandam Pillai* for Respondents.

Abdur Rahim and
Moore, JJ. — A. S. No. 305 of 1918.
1920, March, 9.

Partnership—Partner—Reference to arbitration by—Validity as between stranger and other members of firm—Bona fide *submission by partner—Award—Binding nature on partners interse.*

In a suit brought by a stranger against a partner of a firm for the recovery of sums due by the firm, the partner cannot, without special authority, bind the firm by a submission to arbitration. 8 Bing. 101 followed.

Held, however, in a suit brought by the partner who *bona fide* submitted to the reference against the other members of the firm for contribution on the basis of the award, that the award was binding on the other members of the firm. 27 M. L. J. 292 referred to.

K. V. Krishnaswami Aiyar and *K. Balsubrahmania Aiyar*, for Appellant.

A. Krishnaswmi Aiyar and *E. Vinayaka Rao*, for Respondent.

Wallis, C. J.
Oldfield and Seshagiri
Aiyar, JJ. — S. A. No. 146 of 1919.
1920 March, 11.

Transfer of Property Act Ss. 60 and 98—Anomalous mortgage—Rights of the parties—Redemption.

The rights of the parties to an anomalous mortgage are strictly governed by the terms of their contract and S. 60 of the Transfer of Property Act does not govern S. 98.

Held, on the construction of the mortaage in the case, that the document was a combination of a simple and an usufructuary mortgage and therefore did not come within S. 98 of the Transfer of Property Act.

P. Narayanamurti, for Appellant.

A. Krishnaswami Iyer, for Respondent.

Abdur Rahim and,
Moore, JJ.
1920, March, 11.

A. S. No. 214 of 1919.

Hindu Law—Stridhanam—Succession— Husband's bhandus *preferred to sister and sister's son of last owner.*

Where a Hindu woman married in the Brahma form dies issueless leaving stridhanam properties, the *Bhandus* of her husband succeed to her in preference to her own sister and sisters' son.

I. L. R. 36 M. 116 ; I. L. R. 37 M. 293 ; I. L. R. 42 C. 384 P. C. Relied on.

A. Krishnaswami Aiyar for *T. R. Venkatarama Sastri, and K. S. Venkatarama Aiyar,* for Appellant.

T. Rangachariar, A. V. Visvanatha Sastri and *V. N. Venkatavardachariar,* for Respondent.

Sadasiva Aiyar, and
Spencer, JJ.
1920, March, 12.

S. A. No. 932 of 1919.

Hindu Law—Adopted son—Adoption subsequent to death of husband—Rights of adopted son—Self-acquired property—Succession Certificate if necessary—Succession Certificate Act, S. 4

The following questions were referred to a Full Bench :—

1. Whether a person who is adopted by a widow after the death of her husband, takes the ancestral properties of his adoptive father as heir or by survivorship ?

2. Whether the self-acquired properties of the adoptive father devolve on the adopted son by survivorship or as an heir ?

3. Whether the adopted son has to obtain a succession certificate before collecting the debts due to his deceased father, whether they are ancestral or self-acquired properties of his adoptive father ?

A. V. Visvanatha Sastri, for Appellant.

T. R. Venkatrama Sastri, for Respondent.

Oldfield and Seshagiri Aiyar, JJ.
1920, March, 16.

S. A. No. 953 of 1917.

Limitation Act art. 14—Recognition of landholder by Collector under S. 3 (5) of the Madras Estates Land Act—Suit for declaration of title—Limitation.

Where in proceedings under S. 3 (5) of the Madras Estates Land Act, the Collector refuses to register the plaintiff as landholder and he brings a suit for declaration of his title as landholder in a Civil Court. *Held,* that art. 14 of the Limitation Act did not apply and that he was not bound to sue within a year of the Collector's order.

T. Narasimha Iyengar, S. Rangachariar and *S. Vaithinatha Iyer* for Appellants.

T. Rangachariar and *K. Sankara Sastri* for Respondent.

Oldfield and Seshagiri Aiyar, JJ.
1920, March, 17.

C. M. S. A. No. 20 of 1919.
and C. R. P. 145 of 1919.

Decree—Order amounting to —C. P. C.—Or. 22 R. 2—Death of plaintiff—Application to continue suit—Order refusing—Appeal.

An order under Or. 22 R 2 C. P. C. refusing an application to continue a suit after the death of the plaintiff therein on the ground that the cause of action did not survive to the applicant amounts to a decree and is appealable as such.

S. Ramaswami Aiyar for *K. Rajah Aiyar* for Appellant.

S. Muthiah Mudaliar for Respondents.

Oldfield and Seshagiri Aiyar, JJ.
1920, March, 18.

C. M. A. 136 of 1919.

Succession Act—Letters of Administration—Grant of—Procedure —Order granting letters to Caveator—Validity—Conditions.

Where, without complying with the procedure prescribed by the Succession Act for a grant of letters of administration, the Court below granted letters to a Caveator who had filed a Caveat opposing the grant of letters to the applicant and praying for a grant thereof to himself, *held* that the order of the Court below was bad and must be set aside.

K. Rajah Aiyar for Appellant.

S. Ramaswami Aiyar for Respondents.

Oldfield and Seshagiri Aiyar, JJ.
1920, March, 18.

S. A. No. 387 and 839 of 1919.

Negotiable Instruments Act S. 3—Banker—S. 5—Bill of exchange —District Board Engineer—Order for payment out of Fund deposited with Government treasury—S. 54 of Local Boards Act—Order in form *presented by S. 145—Endorsement of, to* bona fide *holder—Rights of.*

Where a District Board Engineer, who had ordered certain work to be done, issued in favour of the contractor an order for their payment out of the fund with the Government treasury lodged under S. 54 of the Local Board's Act and such order was in the form prescribed by the rules and forms framed under S. 145 of the said Act and the said order was indorsed for value in favour of a person who took it *bona fide, held* that the order was a bill of exchange within the meaning of S. 5 of the Negotiable Instruments Act which the District Board must have been empowered to issue under the Local Boards Act and that it was negotiable.

Per *Seshagiri Aiyar, J.*—The Government treasury is not a " banker" within the meaning of S. 3 of the Negotiable Instruments Act.

2 H. L. Cas. 26 ; 10 Exch. 183 at 193 referred to,

R. Srinivasaiyangar, for Appellant.

S. T. Srinivasa Gopalachariar and *K. P. Ramakrishnaiyar,* for Respondent.

Abdur Rahim and Moore, JJ.
1920, March, 18.
A. S. No. 291 of 1919.

Registration—Validity of—Inclusion of property so as to give Jurisdiction to registrar—Registration if valid—Deed—Alteration—Presumption.

The inclusion of an existing item of property in a mortgage deed so as to get it registered in a district other than that in which the bulk of the property is situate, does not render the registration of the document invalid.

I. L. R. 41 C. 972 (P. C.) distinguished.

C. S. Venkatachariar for Appellant,

K. V. Krishnaswami Iyer and *C. A. Seshagiri Sastri* for Respondent.

Sadasiva Iyer and Spencer, JJ.
1920, March, 20.
S. A. No. 2123 to 2139 of 1919.

Madras Estates Land Act S. 189 (3)—Res judicata—*Civil and Revenue Court—Decision of revenue court, when binding.*

The decision by a revenue court of a question of title, though such decision was necessary for the disposal of the case before it and given in a suit exclusively within its jurisdiction, cannot prevent the same question being again litigated between the same parties in a Civil Court.

I. L. R. 26 All. 468 Referred to.

T. Ramachandra Rao for Appellant.

P. Narayanamurthi for Respondent.

Wallis, C. J.
Coutts-Trotter and Krishnan, JJ.
1920, March, 25.

A. S. No. 3 of 1919.

Evidence Act, Ss. 33 and 165—Evidence taken in prior suit—Admissibility of, in subsequent suit—Consent of parties.

The depositions of witnesses taken in a prior suit is admissible in evidence in a subsequent suit between the same parties, if they consent to its reception in the later suit without calling the witnesses again.

P. Somasundaram, for *T. Ramachandra Row,* for Appellant.

P. Narayanamurti, for Respondent.

Oldfield and Seshagiri Aiyar, JJ.
1920, March, 25.

C. M. A. 147 of 1919.

Limitation Act, Art. 181 and 182—Mortgage—Decree for sale under T. P. Act—Affirmance of decree on appeal—C. P. Code—Effect of—Application for order absolute—Limitation.

A mortgage decree for sale was passed in 1907 under the Transfer of Property Act in 1907. The time for payment expired before the new C. P. Code of 1908 came into force. The mortgagor filed an appeal against the decree but the Appellate Court confirmed the decree of the lower court and dismissed the appeal without extending the time prescribed by the lower court's decree. On a question arising as to the further remedies of the decree-holder. *Held,* (1) That a final and executable decree having been passed by the first Court under the C. P. Code, the affirmance of it by the Appellate Court did not change its character ; (2) that the further remedy of the mortgagee was to apply for an order absolute ; (3) that the subsequent passing of the C. P. Code did not affect the rights of the mortgagee and (4) that the application for order absolute was governed by Art. 182 and not by Art. 181 of the Limitation Act.

T. R. Venkatarama Sastri and *S. Panchapagesa Sastri,* for Appellant.

S. Muthiah Mudaliar and *C. A. Seshagiri Sastri,* for Respondent.

Sadasiva Iyer and Spencer. JJ.
1920, March, 26.

S. A. No. 423 of 1919.

South Canara—House-sites—Yearly lease—Improvements by lease—Knowledge of lessor—Compensation, right to.

Where a tenant from year to year of a house-site in South Canara erects costly buildings on the demised land, he is not entitled to compensation for them on eviction, even though the landlord was aware of the erection of the buildings and kept quiet. The remedy of the lessee is to take the improvements with him on the termination of the tenancy.

B. Sitarama Rao, for Appellant.

K. Y. Adiga, for Respondent.

Sadasiva Iyer
and Spencer, JJ.
1920, March, 26.

S. A. No. 845 of 1919.

Hindu Law—Minor—Alienation by guardian—Death of minor—Mother succeeding as heir—Right of reversioners to sue for declaration of invalidity of alienation—Specific Relief Act, S. 42.

The properties of a Hindu minor were alienated by his guardian without any necessity. The minor died before coming of age and was succeeded by his mother as heir. The mother did not take steps to set aside the alienation or to recover the properties. The nearest male reversioner of the minor sued for a declaration that the alienation in question was invalid and the properties formed part of the estate of the last male owner.

Held, that the suit was maintainable under S. 42 of the Specific Relief Act and that the cause of action for the suit arose on the death of the minor.

S. Muthiah Mudaliar, for Appellant.

A. V. Visvanatha Sastri, for Respondent.

Wallis, C. J., Ayling
and Coutts-Trotter, JJ.
1920, March, 29.

C. R. P. No. 1216 of 1918.

Civil Procedure Code, O. 21 R. 89—Right to apply under—Property mortgaged by judgment-debtor after execution sale—Right of mortgagee.

An usufuctuary mortgagee of properties from the judgment-debtor after an execution sale of the same, is not entitled to apply to set aside the sale under O. 21 R. 89, for he could not be said to be an owner of the property within the said provision.

K. S. Jayarama Iyer, for Petitioner.

V. Pattabhirama Iyer, for Respondent.

Chief Justice and
Krishnan, J.
1920 March 31.
S. A. 669 of 1919

Civil Procedure Code S. 92—Suit for accounts and moneys by trustee against Kattalaidar—Sanction if necessary.

Per *Chief Justice* (*Krishnan, J., dissenting*). A suit by the trustee of a temple for accounts and for the recovery of moneys due to the temple from a Kattalaidar is governed by S. 92 of the C. P. Code and requires the sanction of the Advocate-General or the Collector.

C. V. Anantha Krishna Aiyar and *K. P. Ramakrishna Aiyar*, for Appellants.

S. T. Srinivasagopalachari, for Respondents.

Old field & Seshagiri
Aiyar, JJ.
1920, April 8.
S. A. 604 of 1911.

Provincial Insolvency Act. Ss. 16 (2), 18 & 19—Official Receiver—Order of adjudication—Whether the property vests in Official Receiver without an order of Court appointing the Official Receiver, receiver in the particular case—Official Receiver, whether a Court within the meaning of the Provincial Insolvency Act, S. 52.

When an Official Receiver passes an order of adjudication under S. 52 of the Provincial Insolvency Act, he does not act as a Court within the meaning of the Act.

The property of an insolvent does not vest in the Official Receiver on the passing of the order of adjudication; it only vests in him when an order is passed appointing the Official Receiver, the receiver in the particular insolvency.

K. S. Sankara Aiyar for *T. R. Venkatrama Sastri*, for the Appellant.

C. A. Seshagiri Sastri, for the Respondent.

Chief Justice, Ayling
and Coutts-Trotter, JJ.
1920, April, 12.
C. M. A. 263 of 1918.

Civil Procedure Code, S. 21—Mortgage suit—Final decree—Want of territorial jurisdiction—Objection to validity of decree in execution.

If in a mortgage suit a Court passes a final decree without possessing territorial jurisdiction over the hypotheca at the time, the judgment-debtor cannot object to the validity of the decree in execution proceedings, having allowed the final decree to be passed without objection.

A. Krishnaswami Iyer and *S. Ramaswami Iyer*, for Appellant.

C. V. Anantha Krishna Iyer, for Respondent.

Ayling and
Krishnan, JJ.
1920 April. 14. S. A. No. 493 of 1918.

Civil Procedure Code O. 9 Rr. 8 and 9—Cause of action—Suit for declaration and injunction—Dismissal for default—Subsequent suit for partition and possession.

The guardian of a minor alienated his share of certain properties and in execution of a decree against the vendee the properties were brought to sale. The minor brought a suit for a declaration that the sale by this guardian was not binding on him and for an injunction restraining the defendant from proceeding with the sale. The suit was dismissed for default and the defendant purchased the property in execution. Subsequently the plaintiff brought a suit for partition and possession of his share of the properties. *Held*, that the subsequent suit was not barred under O. 9 R. 9 C. P. Code as it was not based on the same cause of action as the prior suit.

Hon. T.R. Ramachandra Iyer, for Appellant.

K. Bhashyam and N. Kunjithapatham Iyer, for Respondents.

Napier and
Krishnan JJ.
1920, April 20. C. R.P. No. 1211 of 1918.

Provincial Small cause Courts Act, S. 23—Small Cause Court—Plaint returned for trial on original side—Subsequent trial as original suit—Jurisdiction—Consent—Waiver.

Except when there is an inherent or absolute want of jurisdiction in a court, the parties can waive any defect or irregularity in judicial proceedings by consent.

A plaint was returned under S. 23 of the Prov. Sm. C. C. Act to be filed on the original side of the Court. Subsequently by the consent of both the parties the suit was transferred from the orignal side and tried and decided by the Small Cause Court. On objection being taken in revision to the jurisdiction of the Small Cause Court; *Held* that the consent of the parties cured the irregularity in the proceedings and the judgment of the court below could not be set aside as being without jurisdiction.

S. T. Srinivasagopalachari, for Petitioner.

T. R. Venkatrama Sastri, for Respondent.

Chief Justice, Oldfield
and Seshagiri Aiyar JJ.
1920. March, 20. S. A. 475 of 1919.

Civil Procedure Code, O. 21 R. 2—Uncertified adjustment—Transfer of immoveable properties—Registration Act (XVI of 1908) S. 17 (2) (vi).

Where immoveable properties worth more than Rs. 100 are transferred from the judgment-debtor to the decree-holder in satisfaction of the decree, the transaction does not require registration if it is embodied in the order of Court recording satisfaction. The document does not require registration to be admitted in evidence.

C. Madhavan Nair, for Appellant.

K. P. M. Menon, for Respondent.

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Jan.—June, 10.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH]

PRESENT :— SIR ABDUR RAHIM, OFFG. CHIEF JUSTICE, MR. JUSTICE OLDFIELD, MR. JUSTICE SADASIVA AIYAR, MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE BURN.

Mutha Korakki Chetty and another ... *Appellants.** *(Defendant-Respondents).*

v.

Mahomad Madar Ammal, and others ... *Respondents (Plaintiffs-Petitionsrs).*

F. B.

Muthu Korakki Chetty
v
Mahomad Madar Ammal.

Indian Limitation Act, Sec. 9 and Art. 180-Sale in execution—Confirmation of sale—Subsequent application for setting aside sale—Sale sustained with regard to some items and set aside with regard to the others—Application for possession by execution purchaser within three years of the second order, but more than three years after the first confirmation of sale—Whether application in time—Accrual of fresh cause of action and suspension of time under an existing cause of action, distinguished—Whether there are grounds for suspension of time not provided for in the Limitation Act—Privy Council decisions discussed.

The legal representatives of the decree-holder bought certain properties of the judgment-debtor in execution of his own decree on 25-3-1913 On 26-4-1913 the sale was confirmed. On 3-1-1914 an application for setting aside the sale was presented and admitted out of the due time on the ground of fraud. On this application, the sale was set aside as regards some items and sustained as regards the others by an order dated 25-6-1915 which was confirmed on appeal on 13-5-1916, and a petition for delivery of possession of the properties regarding which the sale was sustained was presented on 19-2-1917.

Held, per curiam, that such petition for delivery of possession was in time under Article 180 of the 1st schedule to the Limitation Act.

The decisions of the Privy Council on the question of suspension of limitation reviewed and discussed.

Per the Offg Chief Justice and Burn J.

Where an application is made for delivery of possession of properties sold in execution of a decree, the sale does not become absolute within the meaning of

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*A. A. A. O. No. 87 of 1918 1st October, 1919.

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the third column of Article 180 until the application made to set aside the sale under rule 89 or 90 or 91 has been disallowed and the sale upheld, although an order confirming the sale had been passed before the application to set aside the sale was made.

Any deduction of time based on a rule of exclusion or suspension of time covering a larger ground than that traversed by sections 12, 14, 15, 16 and other similar provisions of the Limitation Act, would be unjustified.

Per Oldfield, J : The existence of the cause of action for an application for delivery, to which Article 180, schedule I, Limitation Act applies, is not suspended during the pendency of proceedings for the setting aside of the sale, if in the circumstances time has begun to run.

There is not a general equitable principle, apart from the provisions of the Limitation Act, under which time which has once begun to run is suspended.

Per Sadasiva Aiyar, J : Whenever proceedings are being conducted between parties *bona fide* in order to have their mutual rights and obligations in respect of a matter finally settled, the cause of action for an application or for a suit the relief claimable wherein follows naturally on the result of such proceedings should be held to arise only on the date when those proceedings finally settle such rights and liabilities.

Notwithstanding Section 9 of the Limitation Act, there are some exceptional cases where suspension even as regards the running of time on the cause of action for a suit can take place.

In the present case, the application for possession is not barred by limitation in either aspect *viz.*, on the ground of the accrual of a fresh cause of action or on the ground of the suspension of limitation.

Though Section 9 of the Limitation Act in terms relates only to a suit and not to an application, the words " to sue " have been taken as including " to apply in execution". *Jivraj Gulabchand* v. *Babaji* [1], *Bhagwant Ramchandra* v. *Kaji Mahamad Abas* [2] Ref. to.

Per Seshagiri Aiyar, J : The true rule deducible from the various decisions of the Judicial Committee is this that subject to the exemptions, exclusions, mode of computation and the excusing the delay etc, which are provided in the Limitation Act, the language of the third column of the first schedule should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party. This is a rule of construction and not a rule of law.

Appeal Against the decree of the District Court of Ramnad at Madura in Appeal Suit No. 462 of 1917, preferred against the order of the Court of the District Munsif of Paramakudi dated 13th September 1917 in E. A. No. 343 of 1917 in E. P. No. 1131 of 1912 in O. S. No. 680 of 1910.

The Court (Oldfield and Seshagiri Aiyar, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :

Oldfield, J.

Oldfield, J:—Petitioner, whose legal representatives are the Respondents, bought properties at Court auction in execution of his own decree on 25-3-13 and the sale was confirmed on 26-4-13. On

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[1] (1904) I. L. R. 29 Bom. 68.

[2] (1912) I. L. R. 36 Bom. 498.

3-1-14, before the three years, within which he could apply for possession under Article 180 Schedule. I, Limitation Act, had elapsed, an application for the setting aside of the sale was presented and was admitted out of due time on the ground of fraud. On it the sale was set aside as regards some items and sustained as regards others, the order to this effect being passed in the Court of First Instance on 25-6-15 and in the Appellate Court on 13-5-16. The present petition for delivery was presented on 19-2 17. On these facts the questions raised are whether that petition is in time and incidentally whether such a petition is sustainable in the circumstances with reference to the earlier or later order of confirmation.

The latter question arises on the argument accepted by the Lower Appellate Court, that the delivery asked for is to be based on the second order of confirmation and could not have been asked for until it had been passed and a fresh sale certificate had been drawn up. For the suggestion in the judgment under appeal that such a fresh certificate is necessary we have been shown no warrant. There is no reason for holding that delivery can be asked for or should be granted only of the whole property sold and not of particular item included in it. Whether or no the Court's last order included any explicit cancellation of the certificate as regards the items affected by it, this argument cannot be regarded as substantial, there being no reason why the original certificate should be treated as superseded so far as the items, of which the sale was sustained, were concerned and not as amended in conformity with the order in respect of the others. It is urged however more generally either that the admission of the application for cancellation of the sale deprived the previous confirmation of the finality, which enabled petitioner to ask for delivery in accordance with it or that in any case time did not run and petitioner was under no obligation to apply so long as the confirmation, which would be the basis of his petition might possibly or probably be set aside.

In dealing with the first of these contentions it is to be observed that there is no question of suspension of petitioners' right to apply during any part of the period in question pending an appeal. For the application for cancellation of the sale was not an appeal, beingmade under Order XXI, Rule 90 to a Court of First Instance; and it is not suggested that the subsequent appeal related to the items, of which delivery is now claimed. There is no question of an explicit injunction or other direct obstacle to petitioners' obtaining relief. Reference has not been made to any provision of law as authorzing the view that a mere attack on an order can render it ineffective or suspend its efficacy or

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stop the running of time which has once begun to run against the person who obtained it.

This is material as entailing the failure of the first of the two contentions above referred. With reference to the second, although the conclusion proposed is the same, the principle relied on differs slightly. That principle is not that the validity of the order of confirmation is affected by the filing of the petition for its cancellation, but that the running of time for action on it is suspended directly. It is, to adopt the language used by my learned brother in *Doraisami Padayachi* v. *Vaidylinga Padayachi* [1] the suspension, not of the existence of the cause of action, but of the running of time. For this contention also no statutory basis has been alleged. The question is only of the effect of the authorities to be referred to.

In *Somasundram Pillay* v. *Vannilinga Pillay* [2], Ayling, J. and my learned brother endorsed the principle that, "if circumstances exist which would render a suit or application infructuous, a party should not be compelled to institute it, until the impediment which stands in the way is removed" and in *Secretary of State* v. *Raja Vadrevu Ranganayakama* [3] the decision of Abdur Rahim, J. which prevailed, seems to me to entail that as I put the point in dispute the running of time is suspended so long as any pending proceeding, in which any matter essential to the determination of the claim is in issue, remains undecided. The authorities now relied on are with one exception, *Baijinath Sahai* v. *Ramgut Singh* [4] referred to in my judgment in that case and on one ground or another rejected as inapplicable to the facts then before us and as insufficient to support the general proposition then necessary for the appellant plaintiff's success. They in fact, as I understand the points actually decided in them, fall into three classes: those firstly in which the plaintiff was allowed the time occupied in seeking one remedy, usually specific performance of an agreement, before he sought another, for instance damages to which he ultimately discovered his right; those next (and *Baijnath Sahai* v. *Ramgut Singh* [4] is one of them) in which his right to sue was suspended whilst he had or in good faith believed that he had secured what he claimed; and lastly those, if the decision in *Jogesh Chunder Dutt* v. *Kalichurn Dutt* [5] is correct, in which an outstanding adjudication could have been pleaded against his claim. None of these classes accordingly, if the actual result of the cases comprised in them is regarded, covers the case before us. For here throughout the right of the petitioner to apply for delivery of the items,

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[1] (1917) 33 M. L. J. 46.

[2] C. M. A. No. 355 of 1915.

[3] A. S. Nos. 113 and 402 of 1917.

[4] (1896) I. L. R. 23 C. 775.

[5] (1877) I. L. R. 3 C. 30

Oldfiled, J.

in respect of which he is applying was known to be enforceable and to require enforcing ; and there was no obstacle in the way of its being enforced in the shape of any actual collateral adjudication. There was in fact merely the possibility of one ; and I do not think that the principle relied on covers or should be extended to cover such a case.

The difficulty however arises, not from the actual conclusions in these cases, but from the way in which the reasons for those conclusions are stated. For, especially in *Baijnath Sahai* v. *Ramgut Singh* 1, there is much to suggest that a general rule was being enunciated and that the intention was to hold generally in favour of the right of a plaintiff or applicant to defer institution of his proceedings, so long as any reasonable doubt existed regarding his position and the necessity for or possibility of proceedings being taken. It is not clear how that language or the principle underlying the judgments, in which it occurs, can be reconciled with the other interpretations of the Limitation Act, to which my learned brother has referred in the judgment, which I have had the advantage of reading ; and I therefore agree to the reference proposed by him.

The question referred is :—

Whether the existence of the cause of action for an application for delivery, to which Article No. 180, Schedule I, Limitation Act applies, is suspended during the pendency of proceedings for the setting aside of the sale ?

Seshagiri Aiyar, J.

Seshagiri Aiyar, J. :—I agree that the question raised by my learned brother should be referred to the Full Bench. The sale in question was made in Court auction on the 25th of March 1913. It was confirmed on the 26th of April in the same year. An application to set aside the sale followed. The final order was on the 25th of June 1915. It is in these terms : " In the result I set aside the sale so far as the interest of petitioners 1 to 3 in the properties sold is concerned and dismiss the petition so far as petitioners 4 and 5 are concerned." The present application is for delivery of the right, title and interest of the defendants against whom the application to set aside the sale, was dismissed. The District Judge held that time began to run only from the 25th of June 1915. The question for consideration is whether he is right. The article applicable is 180, and under it the starting point is the date on which the sale becomes absolute. There can be no doubt that this language in Col. 3 of the third schedule has been taken from Order XXI, Rule 92 of the Code of Civil Procedure. The article is a new one. Under the old Code there were differences of

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1. (1896) I. L. R. 23 C. 775.

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opinion as to whether an application for delivery must be made only in execution or whether a suitc an be instituted even though more than three years had elapsed from the date of the confirmation of the sale. The new article has been introduced with a view to remove these doubts. The suggestion made by the learned vakil for the respondent that the application may be brought under article 181 should be rejected. His contention that as in 1915 the sale was partly confirmed and partly set aside, article 180 is not in terms applicable, is not wellfounded. It is true there are no provisions in the Code of Civil Procedure for a second confirmation either partially or wholly when the application to set aside a sale succeeds or fails. I do not think that is a good reason for applying the residuary article, where there is one which in terms applies to the applications made.

Mr. Sitarama Rao then argued that although in terms the sale was confirmed and made absolute on the 26th of April 1913, the confirmation must be deemed to have been suspended until the 25th of June 1915 when the final order on the application to set aside the sale was made. The strongest case that was quoted by him is *Baijinath Sahai* v. *Ramgut Singh* [1]. That decision was given with reference to Article 12 of the Limitation Act. The short facts were that a sale was confirmed by the Collector in 1882 and was upheld in appeal, by the Commissioner. In 1884, the Revenue Board set aside both these orders. On an application for review the Board discharged its own order in 1886. The suit was brought in 1887, within a year of the last order of the Board of Revenue but more than a year after the order confirming the sale. The Judicial Committee held that the suit was in time. By the language of Article 12 time begins to run from the date when the sale is confirmed. The Judicial Committee at p. 785 say : " Their Lordships are of opinion that there was no final, conclusive and definitive order confirming the sale, while the question whether the sale should be confirmed was in litigation, or until the order of the Commissioner of the 25th January 1884 became definitive and operative by the final judgment of the Board of Revenue on the 21st August 1886, or (in other words) that for the purpose of the law of Limitation there was no final or definitive confirmation of the sale until that date." They further on say : " It cannot be said in the opinion of their Lordships when the parties were litigating before the Revenue Courts as to whether the sale should be confirmed or not because that was the object of the litigation before the Revenue Courts, that the sale had either become final or conclusive." The same language might not be inaptly employed in the present case. So long as the judgment-debtors or any of them disputed the finality of the sale by seeking to set it aside it may be said that there was no final or conclusive sale or to use the language of Lord Davey "that for the purpose of the law of Limitation the sale had not become absolute" until the 25th of June 1915. In *Baijinath Sahai* v. *Ramgut Singh* [1] it was pointed out that the Board of Revenue acted without jurisdiction in interfering with the order of the Commissioner. Still the Judicial Committee held that these infructuous proceedings before the Board had the effect of suspending the operation of the confirmation of the sale. The view taken by the Calcutta High Court in *Janak Prasad* v. *Netram* [2] also supports the respondent. *Sabapathy Chetti* v. *Rangappa Naicken* [3] is also in his favour.

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[1] (1896) I. L. R. 23 C. 775.

As against these decisions it must be said that the language of the Limitation Act is so explicit that it is not open to us to import considerations like those which influenced the Judicial Committee into the present case. Other decisions of the Privy Council containing similar observations were quoted before us and I shall now refer to them. In *Mussumat Ranee Surnomoyee* v. *Shooshee Mokhee Burmoni,* [4] which was a case in which a revenue sale was set aside by the Collector the land-lord sued to recover arrears of revenue within three years of the setting aside of the sale. It was contended that the claim for arrears was barred by limitation as the suit was brought more than three years after the rent became due. Their Lordships say: "It seems to their Lordships to be perfectly clear, that the cause of action accrued at the time at which, the sale having been set aside, the obligation to pay this sum of money revived." They further on say: "that upon the setting aside of this sale, and the restoration of the parties to possession, they took back the estate, subject to the obligation to pay the rent; and that the particular arrears of rent claimed in this action must be taken to have become due in the year *in which that restoration to possession took place.*" This decision does not by itself lend support to the contention of the respondent. But this has been relied on in very many subsequent cases as indicating the view of the Judicial Committee that there can be a suspension of a cause of action during the period when it would be infructuous to sue on the original cause of action. The next Privy Council case relied on was *Basu Kuar* v. *Dhum Singh* [5]. Some general observations in that judgment are often quoted at the bar. Their Lordships said. "It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril

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[1] (1896) I. L. R. 23 C 775

[2] (1914) 22 I. C. 497.

[3] (1903) 13 M L. J. 225

[4] (1918) 12 M. I. A. 244

[5] (1888) I. L. R. 11 A. 47.

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of losing his property if he does not. And it would be a lamentable state of the law if it were found that a debtor who for years has been insisting that his creditor shall take payment in any particular mode can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time has relieved him from paying at all." In a later case, *Nrityamoni Dassi* v. *Lakhan Chandra Sen* [1], their Lordships expressed their concurrence with the view taken in *Lakhan Chundra Sen* v. *Madhu Sudan Sen* [2]. When the Calcutta decision is examined it will be found that the learned Judges introduced a theory of suspension of limitation which is not warranted either by section 14 or 15 of the Limitation Act. Sitting with Ayling, J., I had to consider the applicability of these cases in *Somasundram Pillai* v. *Vannilinga Pillai* [3]. Sitting with the learned Chief Justice a similar question was considered in *Doraisamy Padayachi* v. *Vaidyalinga Padayachi* [4]. Speaking for myself I must say that I always felt with reference to these Privy Council decisions there is as much to be said against my view as in favour of it. The dicta of the Judicial Committee in the above cases may be said to conflict to some extent with the view of the Board in *Soni Ram* v. *Kanhaiya Lal*, [5] and in *Rani Kuar Mani Singh Mandhata* v. *Nawab of Murshidabad* [6]; in the the latter case their Lordships suggest that no suspension or extension of limitation is allowable unless the same is specifically provided in the Limitation Act. In *Soni Ram* v. *Kanhaiya Lal*, [5] the right of a mortgagor to redeem became inoperative for a time owing to the fusion of rights as mortgagor and as purchaser. After the dissolution of this dual capacity, he applied to redeem the property and claimed to deduct the time during which the fusion subsisted. Sir John Edge in delivering the judgment of the Board stated: "There is nothing in Act XV of 1877 which would justify this Board in holding that, once that period of limitation had begun to run in this case, it could be suspended. Their Lordships consider that if they were to hold that, by reason of the fusion of interests between 1883 and 1898, the period of limitation was suspended, they would be deciding contrary to the express enactment of that section that "when once time has begun to run no subsequent disability or inability to sue stops it." This language can equally be well applied to the present case. Once time began to run under Article 180 on the sale becoming absolute, the subsequent inability consequent on the application to set aside the sale cannot stop the limitation which had already begun to run. Apart from

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1. (1916) I. L. R. 43 C. 660.
2. (1907) I. L. R. 35 C. 209.
3. C. M. A. No. 355 of 1915.
4. (1917) 33 M. L. J. 46.
5. (1913) I. L. R. 35 A. 227.
6. (1918) 36 M. L. J. 210.

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other cases. I think there is a conflict between *Baijinath Sahai* v. *Ranjut Singh* [1] and *Soni Ram* v. *Kanhaiya Lal* [2] both of which are decisions of the Judicial Committee. I therefore agree that the question should be referred for the decision of the Full Bench.

K. Bhashyam Aiyangar, for the appellants.

B. Sitarama Rao, for the respondents

The Court expressed the following

Abdur Rahim, O. C. J.

Opinion :—*The Officiating Chief Justice* :—The question referred to the Full Bench arises under Article 180 of the Limitation Act.

A person, who purchased certan properties at a Court auction in execution of his own decree on the 25th of March 1913, applied for delivery of possession on the 19th of February 1917. An order confirming the sale was made on the 26th of April 1913, but on the 3rd of January 1914, that is more than 30 days afterwards, an application was made on behalf of the judgment-debtor for the setting aside of the sale. That application was disposed of by the Court of First Instance on the 25th of June 1915, the Court setting aside the sale in respect of some of the items and upholding it as regards the other items. That order was appealed from and the Appellate Court dismissed the appeal on the 13th of May 1916.

It will thus be seen that the application for delivery of possession of the property would be barred under Article 180 if the time of 3 years allowed by the second column be reckoned from the 26th of April 1913 when the sale was confirmed under Rule 92 of Order XXI of the Civil Procedure Code no application for setting aside the sale having been made by that time ; but it would be within time if the period of limitation commenced on the 25th June 1915, the date of the order adjudicating upon the application made under Rule 90 to set aside the sale on the ground of irregularity or fraud by which the sale as regards some of the items was set aside and the sale as regards the other items was upheld.

There can be no doubt that Article 180 applies to cases where the sale is confirmed and thereupon becomes absolute

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[1] (1896) I. L. R. 23 C. 775. P. C.

[2] (1913) I. L. R. 35 All 227 (P. C.,

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under the provisions of Rule 92. That rule contemplates that such an order is not to be made until the application to set aside the sale under Rule 89 or 90 or 91 if any, has been disposed of and disallowed. The question under reference would hardly arise in cases where the application to set aside the sale is made in the ordinary way within the period of 30 days under Article 166. The difficulty has evidently arisen because, no application to set aside the sale having been made within 30 days, the Court had in the usual course made the order confirming the sale.

The question then is, when the Court entertains an application to set aside the sale after the order confirming the sale had been made but before the period of 3 years allowed to the purchaser for applying for delivery of possession has expired, whether time must be reckoned against the applicant from the date of the order of confirmation of sale, or whether that order should be treated as not having the effect of making the sale absolute within the meaning of Article 180 but that the sale should be deemed to have so become absolute from the date when the application for setting it aside was disposed of. I do not think the fact that the sale was set aside in respect of some of the items included therein and upheld as regards the other items should make any difference as to the application of Article 180 for we are not concerned with the properties the sale of which has been set aside and as regards the rest posssession of which alone is sought, the point for decision is whether the entertainment of the application to set aside the sale had or had not the effect of preventing the sale becoming absolute within the intendment of Article 180. Even without the help of the Privy Council rulings which I shall presently notice, I should answer, that in the given circumstances, the sale did not become absolute until the petition made to set it aside had been disallowed. Rule 92 has primarily in contemplation cases where the application to set aside the sale is made within the limit of 30 days allowed by the law so that any order confirming the sale would be ordinarily made after the disposal of such applications. But if the Court in this case was justified——and I take it that it was——in entertaining the application to set aside the sale after it had made the order confirming the same, can it be said that, whatever be the result of the application, the order confirming the sale remained effective so as to make the sale absolute from the date on which it was drawn up ? To my mind, obviously not. The effect of entertainment of the application to set aside the sale after the order of confirmation must, having regard to the intention of the legislature as disclosed in this rule and quite apart from any general theory in such connections, be to render the order ineffective so as to make the sale absolute. If we were to proceed upon an absolutely literal interpretation of the language of Rule 92 without paying due regard to the intention of the legislature, this case would have to be treated as lying outside that rule, for it requires that the order of confirmation should be made after the disposal of any application to set aside the sale. If so treated there would be no difficulty in the application of Article 180. Whether it is the practice to issue a second certificate on the disposal of such an application or not cannot, to my mind, affect the application of Article 180 ; but I should suggest that a fresh certificate ought to be issued, if not in all cases, at least in those cases where the sale is only partly upheld as the result of an application made to set it aside after the passing of the order confirming the sale.

Upon a proper interpretation, therefore, of Article 180 read with Rule 92 of Order XXI, Civil Procedure Code, I should hold that, where an application is made for delivery of possession of property sold in execution of a decree, the sale does not become absolute within the meaning of the third column of Article 180 until the application made to set aside the sale under Rule 89 or 90 or 91 has been disallowed and the sale upheld, although an order confirming the sale had been passed before the application to set aside the sale was made. The question referred to the Full Bench, I may mention, is framed in the form as it is, apparently with a view to ascertain the scope and effect of certain rulings of the Judicial Committee which have latterly been the subject of much discussion in this court. But I do not feel myself bound by the frame of the

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question to state my conclusion as to the application of the Article 180 to circumstances such as arose in this case with reference only to the mode of computation mentioned in the question.

Of the Privy Council rulings, the one that has the closest application to the facts of this case is that of *Baijnath Sahai* v. *Ranjut Singh* [1]. There stating shortly the effect of the judgment of the Judicial Committee as given in the head note, the Board of Revenue of Bengal, discharged an order of the Commissioner, dated January 25th, 1884, which had confirmed a sale by the Collector in 1882, but afterwards on August 21st, 1886, discharged its own order and revived that of the Commissioner. It was held that the confirmation of sale dated only from the last order of August 21st, 1886, within the meaning of Art. 12 of Act XV of 1877, which provides one year, for a suit to set aside a sale for arrears of Government Revenue, or for any demand recoverable as such arrears, from the date on which the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought. At page 785 their Lordships say that they did not base their decision on the provision of Section 14 of the Limitation Act which provides for the exclusion of the time of proceeding *bona fide* in Court without jurisdiction, but because they were of opinion "that there was no final, conclusive and definitive order confirming the sale, while the question whether the sale should be confirmed was in litigation, or until the order of the Commissioner of the 25th January 1884 became definitive and operative by the final judgment of the Board of Revenue on the 21st August 1886, or (in other words) that for the purpose of the law of limitation there was no final or definitive confirmation of the sale until that date."

I do not think that much light would be obtained over the present question by discussing in detail the other rulings of the Privy Council cited before us a summary of which is set out in the Order of Reference and which I also had the occasion to discuss previously in *Secretary of State* v. *Raja Vadreva Ranganayakamma* [2]. No doubt there are general observations in some of the cases such as *Basu Kuar* v. *Dhum Singh*[1] where it is stated, " It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not", or that the right of plaintiffs to bring an action to recover certain property would be suspended because of certain intermediate litigation (*See Lakhan Chunder Sen* v. *Madhusudan Sen* [2] and *Nrityamoni Dassi* v. *Lakhan Chandra Sen* [3]) in which his title to the property happened to be under investigation. But it is hardly to be inferred from such observations that the Privy Council intended to lay down any rule or rules for exclusion of time other than those mentioned in various sections of the Limitation Act, such as 12, 14 etc. Or that when time has once begun to run, it will be, suspended otherwise than according to the provisions of Section 9 or any other similar provision of the Limitation Act itself. In *Mussumat Ranee Surno Moyee* v. *Shooshi Mokhee Burmonia* [4] their Lordships had to determine when the cause of action accrued with reference to Section 32 of Act X of 1859 whether at the end of each fasli year when the rent became due or on the date of the decree reversing the auction sale of the Putnee Talook belonging to the plaintiff Zamindar, and they decided in favour of the date of the decree reversing the auction sale. I do not see that any general principle of interpretation or application of the Limitation Act can be deduced from this decision which would be of any guidance in the present case. In *Basu Kuar* v. *Dhum Singh* [1] in a suit for specific performance for sale of land, it was ruled that the plaintiff's cause of action for recovering the debt which was the consideration for the agreement for sale which failed, arose on the date the decree refusing specific performance was passed, because a new obligation was imposed on the defendant by that decree. The cases in *Udit Narain Misr.* v. *Muhammad Minnatulla* [5] and *Jamma Das* v. *Najiniun-nissa Bibi*[6] were also of a similar nature. And in all these cases the article under consideration was No. 97 of Act

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[1] (1896) I. L. R. 23 C. 775.

[2] A. S. Nos. 113 and 402 of 1917.

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[1] (1888) I. L. R. 11 A. 47 at 56.

[2] (1907) I. L R. 35 C. 209.

[3] (1916) I. L. R. 43 C. 660.

[4] 12 M. I. A. 244.

[5] (1903) I. L R. 25. A. 618.

[6] (1906) I. L. R. 28 A. 466.

1877 which was applicable to suits for money paid upon an existing consideration which afterwards failed. In *Rangayya Appa Row* v. *Bobba Sriramulu* [1] the Judicial Committee held that until the puttah was settled under the special provision of the Local Act VIII of 1865, time did not run, but that limitation was to be computed only from the date of the final decree determining the rent. I must however observe that it would almost look that in my judgment in *Secretary of State* v. *Raja Vaedreva Ranganayakamma*[2] I tried to deduce from these cases a principle of general and unlimited application to the effect that where the rights of the parties have been subjected to determination by the Court, it is from the date of the determination of such rights the limitation should be computed. But on further consideration I am persuaded that any such deduction would be unjustified, if it be meant thereby to introduce a rule of exclusion or suspension of time covering a larger ground than that traversed by Ss. 12, 14, 15, 16, 19 and other similar provisions of the Limitation Act. I need hardly say that I do not desire to express any opinion on the question of limitation involved in the Appeals Nos. 113 and 402 of 1917 as a Letters Patent Appeal is now pending from my judgment. But as I have already suggested, it is not necessary to attempt to deduce any rule of general application in order to answer the question which arises in this case and that the answer, as I have stated, should be that time should be computed from the date of the order disallowing the petition to set aside the sale and not from the date of confirmation passed before the application to set aside the sale was made.

Oldfield, J.

Oldfield, J. :—The question I propose to answer is that which has been referred and not any other, which may appear to afford a ground of disposal in the appeal, in which the reference has been made.

That question is whether the existence of the cause of action for an application for delivery is suspended during the pendency of proceedings for the setting aside of the sale and I do not understand it as raising the distinct question whether

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1. (1903) I. L. R. 27. M. 143.
2. A. S. Nos 113 and 402 of 1917.

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the order of confirmation, which had been passed in the case before the referring Judges, had been deprived of the finality which it originally possessed. The distinction is clearly marked in my referring order by the reference to the judgment of Seshagiri Aiyar, J., in *Doraisami Padayachi* v. *Vaidyalinga Padayachi* [1] and I propose to adhere to it.

The conflict we have to resolve is between, on the one hand the unrestricted language of Sections 3 and 9, Limitation Act, which has more than once, as the referring order of Seshagiri Ayyar, J., shows, been regarded as subject only to the exceptions allowed by some specific provision of law, and on the other certain decisions of the Judicial Committee and the language used in them, which are relied on as involving the existence of an equitable power to relax the provisions of the Act in such cases as the one before us.

It is unnecessary to extract the sections of the Act or to insist on their unrestricted character except by pointing out, what will be material in the sequel, that Section 3 is affected by Section 14 in the case of an application, only when the applicant has been prosecuting, not when, as in the case under reference, he has been on his defence, in another proceeding. That is involved by the reference in S. 14 for prosecution in good faith, by the terms of explanation II and by the absence of any reason for supposing that a change in the law was intended when the clear language in the corresponding Section of the former Act XV of 1877 was abandoned. Subject however to this, Sections 3 and 9 are comprehensive. In order to evade them, reliance has been placed on decisions of the Judicial Committee, the effect of which was stated in the recent judgment in *Somasundaram Pillai* v. *Vannilinga Pillai* [2] to which Seshagiri Aiyar, J., was a party, as being that " if circumstances exist, which would render a suit or application infructuous, a party should not be compelled to institute it, until the impediment in the way is removed." It is for us to decide whether this general principle can be deduced from the cases relied on.

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[1] (1917) 33 M. L. J. 46

[2] C. M. A No 355 of 1915.

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Those cases have been referred to in my order of reference as falling into three classes ; and I adhere to that classification in supporting the conclusion, which the fuller argument we have now heard in my opinion entails, that the proceedings in each case were really regarded as in time with reference, not to any extension of the period available for taking them, but to the adoption of a starting point for limitation, which was discovered, either where none had been available before or in supersession of one already in existence. This is, if I understand the opinion to be given by Seshagiri Aiyer, J., correctly, in accordance with the view which he would take although I should respectfully describe it as putting a more accurate, not a more liberal, construction on column 3 of the schedule.

Thus in the first class of cases referred to, those in which the plaintiff, after claiming one remedy in good faith, but unsuccessfully, sought another to which his right was ascertained in his previous proceedings, the decision in *Basu Kuar* v. *Dhum Singh* [1] was based statedly on the fact that from the date, on which an agreement to convey property in satisfaction of a debt was held unenforceable, a new liability for money paid on a consideration which failed was imposed on the debtor in supersession of his liability under the agreement or for the debt; and the *dictum* relied on here, " It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation on pain of losing his property " can be fairly applied, as stating not any general principle, but merely an *argumentum ab inconvenienti* in connection with the reference immediatety preceding it to the period during which the decree of the Court of First Instance upholding the agreement was in force. This is in fact the explanation of the decision, which was given in *Jamma Das* v. *Najim-un-nissa Bibi* [2] and approved by the Judicial Committee in *Udit Narain Misra* v. *Mahammad Minnatulla* [3] and *Amma Bibi* v. *Udit Narain Misra* [4].

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[1] (1888) I. L. R. 11 A. 47.
[2] (1906) I. L. R. 28 A. 466.
[3] (1903) I. L. R. 25 A. 618.
[4] (1908) I. L. R. 31 A. 68.

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The next class of cases comprised those in which the plaintiff, having obtained all he wanted in previous proceedings, had, when those proceedings were set aside, to take fresh ones in connection with which limitation was pleaded; and the decisions in his favour are easily intelligible with reference to the date of his deprivation of the relief he had secured. Thus in *Mussumat Ranee Surno Moyee* v. *Shooshee Mokhee Burmonia* [1], the plaintiff's claim having, as the Committee pointed out, once been satisfied by the sale, which was afterwards set aside, it was only when it ceased to be satisfied that the cause of action afterwards sued on became available; and, although Sir R. Collier in *Huro Pershad Roy* v. *Gopal Das Dutt* [2] referred to this case, as establishing an exception to the operation of the statute, and in explaining it spoke of the "period of time in which the statute might not run" he described the exception as "rather apparent than real" and the whole tenor of his Judgment was consistent with the view I am taking. Another case in this class *Lakhan Chundar Sen* v. *Madhusudan Sen*[3] calls for notice, because there is no doubt that the judgments in it contain language, in which a suspension of the running of time is referred to. The facts however need cause no difficulty. For they were that certain defendants in a suit for possession and account in respect of a share, from which the plaintiff's alleged dispossession, succeeded in obtaining a decree for ascertainment of their own share; and the suit for such ascertainment; which they had to bring when the decree in their favour was set aside, was held to be in time, as it might be consistently with the principle under discussion, on the ground that their cause of action arose, only when they were deprived of the relief they had once obtained. In the High Court however, although the judgment mentions the inability of these parties, so long as the decree in their favour subsisted, " to institute a fresh suit for the object, which had been successfully attained, " their case is described as having been that their rights were suspended; and *Prannath Roy Choudry* v. *Rookea Begam* [4] and the observations of Lord Eldon in *Pulteney* v. *Warren* [5] are referred to, the former dealing with the existence of sufficient cause within the meaning of Bengal Reg. III of 1873, S. 14 and the latter with the English principle reproduced in our S. 15 (1). The Judicial Committee also, in shortly approving the High Court's decision, referred to the suspension of limitation and the deduction of the period spent in the previous litigation. The High Court however had relied on *Mussumat Ranee Surno Moyee's case* [1] and the Judicial Committee had also referred to the existence of an effective decree, which was capable of being enforced until set aside ; and in these circumstances these judgments indicate only that, although the existence of alternative grounds for their conclusions was present to the minds of the Courts concerned, it was not thought worth while to maintain the distinction between them for the purpose in hand. In the last case of this kind to which I need refer *Baijnath Sahai* v. *Ramgut Singh* [2] the ground of decision is clearly not any suspension of the right to sue. For the Judgment statedly expresses no opinion on the applicability of S. 14 of the Act and is based on the absence of any sale, which the plaintiff could have sued to have set aside, until the cancellation order obtained by him in good faith had been displaced.

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[1] (1868) 12 M. I. A. 244.

[2] (1882) I. L. R. 9 C. 255.

[3] (1907) I. L. R. 35 C. 209.

[4] (1859) 7 M. I. A. 323.

[5] (1801) 6 Ves. 73.

In the remaining classes of cases the plaintiff's claim depended on the principle stated in the judgment of Macpherson, J. in *Jogesh Chunder Dutt* v. *Kalichurn Dutt* [3] as deducible from *Shama Purshad Roy's case* [4] that on the reversal of the main decree, which was the basis of subsequent decrees, the latter are superseded and a suit lies to recover what has been wrongfully paid under them. This principle is of course not one of limitation and its exact scope may come under discussion in another case now pending, to which the reference is made in the judgment of the learned Chief Justice. But *Jogesh Chunder Dutt* v. *Kalichurn Dutt* [3] is material at present, because consistently with it when the limitation applicable to the suit it authorises was considered in *Kalichurn* v. *Jogesh Chunder Dutt* [5] (it was held that time ran from the date of the superseding judgment under Art.

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[1] (1868) 12 M. I. A. 244.
[2] (1896) I. L. R. 23 C. 775.
[3] (1877) I. L. R. 3 C. 30.
[4] (1865) 10 M. I. A. 203.
[5] (1878) 2 C. L. R. 354.

120, not from the erroneous receipt of the payment under Art. 62) and no provision relating to suspension was relied on. The decision in *Narayana* v. *Narayana* [1] proceeded on similar grounds; and both authorities exemplified the conclusion reached in connection with the first class of cases already dealt with, that an accurate application of the third column of schedule 1 rather than reliance on suspension of the running of time, is the means by which apparent hardship to plaintiffs should be avoided.

In the foregoing representative instances from each of the classes of cases referred to in argument have been dealt with: and the result is that none supports the general equitable principle, for which the respondents before us contend. It has been pointed out that S. 14 of the Limitation Act is inapplicable to the case submitted to us and no other positive provision has been relied on. I would therefore answer the question referred in the negative, that in the circumstances stated, if time has begun to run, its running is not suspended

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.—The question referred to the Full Bench is whether the existence of the cause of action for an application for delivery to which Article 180 of schedule 1 of the Limitation Act applies, is suspended during the pendency of the proceedings for the setting aside of the sale.

The relevant dates are as follows :—

(*a*) the court auction sale took place in March 1913 ;

(*b*) the sale was confirmed on the 26th April 1913 ;

(*c*) application to set aside the sale was made on the 3rd January 1914 ;

(*d*) the sale was set aside as regards the interest of some of the judgment-debtors, and it was upheld as regards the others on 25-6-1915 ;

(*e*) the application for possession of the interests of the judgment debtors the sale of whose interests was finally confirmed on 25-6-1915 was made on 19-2-1917.

If the time between 3-1-1914 (when the application to set aside the whole sale was made) and 25-6-1915 (when the final order confirming part of the sale was made) is deducted, then the application of 19-2-1917 is within the period of three

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[1] (1889) I. L. R. 13 M. 487.

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years from the date when the sale became absolute, which is, the date mentioned in column 3 of Article 180.

The matter in controversy was argued in two aspects on behalf of the decree-holder-purchaser (1) that even if the cause of action for the application for possession as made arose when the sale of the interests of all the judgment-debtors was confirmed on 26-4-1913; in other words, that even if the application for possession dated 19-2-1917 is based on the cause of action for possession of the entire interests which arose on 26-4-1913 (the date when the first order of confirmation was made); to put it again differently, even if the time of three years began to run from 26-4-1913 itself notwithstanding that the application was for possession of a fraction of the interests sold on that date, the running of time, was suspended between 3-1-1914 and 25-6-1915 (2) that a new cause of action arose on 25-6-1915 when the final order confirming the sale of the interests of some only of the Judgment-debtors was made and that the time for calculation of the period of limitation for the application of 19-2-1917 arose only on 25-6-1915.

Section 9 of the Limitation Act says "When once time has begun to run, no subsequent disability or inability to sue stops it." Though this section, in terms, relates only to a suit and not to an application, in *Jevaaj* v. *Babaji* [1] and *Bhagwant Ramchandra* v. *Kaji Muhamad Abas* [2] the words "to sue" have been taken as including "to apply in execution." Further the Court auction-purchaser who has made the application for possession can hardly be said to rely on any "subsequent disability or inability," (that is, subsequent to the date of sale), to make the application as "disability" and "inability to sue" are not the same as "inconvenience" or "futility" of suing—one of the two branches of his contention is that his right to apply for possession of those interests whose sale was finally confirmed, arose only on the date of that final confirmation and that as the original confirmation of 1913 was modified by the final confirmation of 25-6-1915, he obtained a new cause of action for the application *making* in conformity with that final order. In *Baijnath Singh* v. *Ramgut Singh* [3], their Lordships of the Privy Council held that a suit for setting aside a sale made on the

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1. (1904) I. L. R. 29 B. 68. 2. (1912) I. L. R. 36 B. 498.
3. (1896) I. L. R. 23 C. 775.

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25th September 1882 by the District Collector and confirmed by the Commissioner on 25-1-1884, though brought in July 1887 more than one year from the date of such confirmation, was not barred by art 12 of Act 15 of 1877, because the Board of Revenue whether with or without jurisdiction, had set aside the Commissioner's order though it afterwards discharged its own order on 21-8-1886. Their Lordships held that limitation for the suit commenced only from the final order of the Board dated 21-8-1886, because there was no "conclusive and definitive order" confirming the sale while the question whether the sale should be confirmed was under litigation, and until the order of the Commissioner on 25-1-1884 became definitive and operative by the final judgment of the Board of Revenue on 21-8-1886; in other words, that *for the purposes of the law of limitation, there was no final or definitive confirmation of the sale until that date.* Their Lordships do not rely upon S. 14 of the Limitation Act which relates to the exclusion of time during which proceedings in Court without jurisdiction are being prosecuted; but put it on the broad ground that the sale itself became "confirmed" within the meaning of the expression in the third column of Art. 12 of the Limitation Act only on the date when the proceedings closed before the Board of Revenue, that is in August 1886, though there had been a confirmation by the Commissioner in 1884 itself. I think the present case is a stronger case for the purchaser than the case reported in *Baijnath Singh* v. *Ramgut Singh* [1]. Whereas Art. 12 uses the expression "when the sale is confirmed," Art. 180 uses the expression "when the sale becomes absolute." If, on an application made to set aside the sale, an order setting aside the sale in part is passed as it has been passed in this case, the sale as made cannot be said to have become "absolute," though a formal confirmation after the expiry of 30 days had taken place. Further, whereas in *Baijnath Singh* v. *Ramgut Singh* [1] the Commissioner's confirmation order of 1884 was ultimately upheld by the final order of the Board of Revenue in 1886, the confirmation order of 1913 in this case was modified ultimately by the final order of 1915. I think the principle underlying the decision of their Lordships both in *Mussamut Surnomoyee* v. *Shooshee Mokhee Burmonia* [2] and *Baijnath*

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[1] (1896) I. L. R. 23 Cal. 775.

[2] (1868) 12 M. I. A. 244.

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Singh v. *Ramgut Singh* [1] might be invoked in favour of the applicant in this case. That Principle (as I understand it is that whenever proceedings are being conducted between the parties *bona fide* in order to have their mutual rights and obligations in respect of a matter finally settled, the cause of action for an application or for a suit the relief claimable wherein follows naturally on the result of such proceedings, should be held to arise only on the date when those proceedings finally settle such rights and liabilities. (The case where the proceedings are by way of appeal is specially provided for by statute law and the decisions based on those special provisions are irrelevant and merely confuse the mind in its analysis of the relevant precedents).

I shall refer to only one more authority. In *Nrityamani Dasi* v. *Lakhan Chandra Sen* [2] their Lordships of the Privy Council confirmed the Full Bench decision of the Calcutta High Court in *Lakhan Chandra Sen* v. *Madhusadan Sen* [3]. The judgment of their Lordships on the question of law involved begins by saying "Their Lordships concur generally with the reasons given by the Appellate Court for overruling the plea of limitation". In the judgment in *Lakhan Chandra Sen* v. *Madhusadan Sen* [3] the learned Judges of the Calcutta High Court (the Appellate Court) not only do not rely upon S. 14 of the Limitation Act, but expressly say "We feel grave doubt whether the case falls within that section". But they rely upon the principle of the Privy Council decision in *Mussamat Surnomoee* v. *Shooshee Mokhee Burmonia* [4] and hold that the right of the plaintiffs to bring an action to recover the property was suspended between the 20th of April 1903 and the 22nd of February 1904, because on the 20th April 1903 they had, as defendants, in a former suit, obtained a decree for the same relief as was claimed in their present action which decree however was reversed on the appeal filed by the plaintiffs of that suit on 22-4-1904. Thus the suspension was not by reason of S. 14 of the Limitation Act but by reason of the principle that a person is not bound to bring an unnecessary suit or to make futile and unnecessary applications during the course of other litigation proceedings in which he and his

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[1] (1896) I. L. R. 23 Cal. 775.

[2] (1916) I. L. R. 43 C. 660.

[3] (1907) I. L. R. 35 Cal. 209.

[4] (1868) 12 M. I. A. 244.

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opponent had been *bona fide* engaged for the ascertainment and settlement of the same rights. The rule of law derivable from the decisions of their Lordships seems to have thus two applications according to circumstances (*a*) creating a fresh cause of action under some circumstances (*b*) suspending the running of time in other circumstances. In *Lakhan Chandra Sen* v. *Madhusudan Sen* [1] affirmed by the Privy Council in *Nrityamoni Dossi* v. *Lakhan Chandra Sen* [2] the "suspension" principle was applied in the case of a suit also. Mr. Rustomji in his book on Limitation published in 1915 (after I. L. R. 35 Cal. and before I. L. R. 43 Cal.) remarks as follows at page 44 (under S. 9) about the decision in *Lakhan Chandra Sen* v. *Madhusudan Sen* [1] :—"It is difficult to see under what provision of the Limitation Act, the Court held that there was a suspension of the right of suit". But as their Lordships of the Privy Council have confirmed *Lakhan Chandra Sen* v. *Madhusudan Sen* [1] approving generally the ratio of its decision, we must hold that notwithstanding S. 9 of the Limitation Act there are exceptional cases where such suspension, even as regards the running of time on the cause of action for a suit can take place. I think that, in either aspect (I am myself inclined to think that in the present case, a new cause of action for this special application for possession of the interests in respect of which alone the sale was finally confirmed arose in 1915), the application for possession in 1917 in this case is not barred by limitation.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J. :—I had to consider the Privy council decisions quoted before us on a number of occasions. I was therefore at first disinclined to write a separate judgment in this case. But as in a case depending upon this judgment and which was posted before Sadasiva Aiyar and Burn JJ., and myself the subject matter is of a value which will enable the parties to go before the Privy Council, and as I think that some of my observations in the previous judgments have been expressed more broadly than they need have been, I have resolved to give expression to my views on the present occasion. By common consent of both parties, notwithstanding the somewhat limited scope of the question referred, arguments were addressed to ascertain the exact scope of the pronouncements

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[1] (1907) I. L. R. 35 Cal 209.

[2] (1916) I. L. R. 43 Cal. 660.

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of the Judicial Committee on the point, whether in addition to the exception enumerated in the Limitation Act it is open to Courts to import a new principle of equity regarding the articles in the first schedule to that Act.

Mr. Sita Rama Rao contended that the decision in the case which led to the reference is governed by *Baijnath Singh* v. *Ramgut Singh* [1]. In my opinion this contention is right. But I base that conclusion not on the ground that there is a general principle of equity apart from the statute, but because in the present case, the construction to be placed on the third column of Art. 180 of the first schedule is concluded by that decision.

It was suggested in the course of the argument that the decisions of the Judicial Committee on this subject are not reconcilable with each other. After giving my best consideration to this argument, I do not think that this argument is well founded. Broadly speaking the decisions of the Board fall under two heads. Under the first head, come *Baij Nath Singh* v. *Ramgut Singh* [1], *Mussammat Surno Mooyee* v. *Shooshee Mokhee Burmonia* [2], *Basu. Kuar* v. *Dhum Singh* [3], *Rangayya Appa Rao* v. *Bobba Sriramulu* [4], *Amma Bibi* v. *Udit Narain Misra* [5], *Nrityamani Dossi* v. *Lakhan Chandra Sen* [6]. Under the second, *Huro Prasad Roy* v. *Gopal Das Dutt* [7], *Soni Ram* v. *Kanhaiya Lal* [8] and *Rani Kuar Mani Singh Mandhata* v. *Nawab of Murshidabad* [9]. It was argued, not without some plausiblity, that the first class of cases recognises the doctrine that where a party in whose favour a cause of action has arisen cannot usefully pursue a remedy at the time, his right of action is postponed to a subsequent date. It was next argued that the second class of cases takes a too literal view of the provisions of the Act, and ignores the above principle of equity. This ingenious suggestion of a conflict between law and equity is not borne out by a close examination of the authorities.

In the cases coming under the second head the Judicial Committee have laid down that there can be no saving of limitation apart from the provisions of the Limitation Act. They have drawn attention to Sections 9 and 14 of the Act and have held that exemptions not covered by these and the other sections should not be imported by Courts, to relieve a party from the bar of limitation. I do not think in the first class of cases this principle is overlooked. What has been done is to put a liberal (rather in the language of Oldfield, J., an accurate) construction on the somewhat loosely expressed words in col. 3 of the first schedule. The sections have been more clearly worded than the third column of the first schedule. In a case decided by five Judges of this Court to which I was a party, almost every one of us pointed this out with reference to Art. 134 of the Limitation Act. There are other instances of a similar kind. The Judicial Committee have, therefore, placed a liberal construction upon the words in the third column to the schedule. Let us take for example *Baij Nath Singh* v. *Ramgut Singh*[1] and the present case. In *Baij Nath Singh* v. *Ramgut Singh*[1] the party through no fault of his found himself in this unfortunate position. The only authority which could confirm the Revenue sale was the Commissioner ; no appeal is allowed from his decision. But an appeal was taken to the Board of Revenue against his order and that body admittedly set aside the order though it had no jurisdiction to do so. Both parties were not aware of this defect of jurisdiction. Both of them submitted to the interference by the Board of Revenue. At a subsequent stage the Board of Revenue confessed that their orders were *ultra vires* and passed proceedings to the effect that the confirmation by the Commissioner was right. In these circumstances the Judicial Committee pointed out that the cause of action arose only when the Board of Revenue vacated their former order and ruled that the order of the Commissioner was valid. This decision does not ignore either S. 9 of the Limitation Act or import a theory of suspension not sanctioned by section 14. In the view of the Judicial Committee, the cause of action should not be regarded as having taken place on a date when no step could be taken to obtain delivery owing to the interference by the Board with the order of confirmation. That is to say, they held that the third column of the schedule should be constructed as if it said that the cause of action arose only when a remedy based on it was available. I shall now examine the case before us. The decision in *Baij Nath Singh* v. *Ramgut*

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[1] (1896) I. L. R. 23 Cal. 775.
[2] (1868) 12 M I. A. 244.
[3] (1888) I. L R. 11 All. 47.
[4] (1903) I. L. R. 27 Mad. 143.
[5] (1908) I. L. R. 31 All. 68.
[6] (1916) I. L. R. 43 Cal. 660.
[7] (1882) I. L R. 9 Cal. 259.
[8] (1913) I. L. R. 35 All. 227.
[9] (1918) 36 M. L. J. 210.

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[1] (1896) I. L. R. 23 Cal. 775.

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Singh [1] would apply word for word to the facts of the present case. Here there was a confirmation of sale. But the Civil Procedure Code has provided the procedure for that confirmation being challenged ; it was in fact challenged ; and although one might think that the challenge came after the time allowed by law, it was allowed to be agitated ; the Court upheld the challenge to some extent. The third column of Art. 180 ignores these considerations, and insists upon a party, if it is literally interpreted, filing a petition for delivery which owing to the pendency of the petition challenging confirmation could not be granted. If this case were before the Judicial Committee, I make bold to say to that they would hold that the cause of action really arose only when there was a final decision on the challenge. Similar explanation can be given with regard to every one of the cases which are catalogued under the first head. None of them contravenes the provisions of the Limitation Act as embodied in sections 4 to 31. All of them may be said to go to some extent, behind the actual words of the third column and to import into the decision considerations based on the intention of the legislature : but none of them introduce a principle which adds to or subtracts from the statutory exemptions. That is my view of the decisions of the Judicial Committee. Therefore in my opinion the true rule deducible from these various decisions of the Judicial Committee is this: that subject to the exemptions, exclusion, mode of computation and the excusing of delay etc., which are provided in the Limitation Act, the language of the third column of the first schedule should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a date when the remedy is available to the party. This is a rule of construction and not a rule of law. I would answer the reference as above leaving each case to be dealt with in the light of these observations.

Burn. J, :—I agree with the conclusions come to by the learned Officiating Chief Justice in the Judgment just pronounced.

C.A.S.

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[1] (1896) I. L. R. 23 C. 775.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE PHILLIPS.

Ippili Magatha and another ... *Accused in Calendar Case No. C. 21 of 1919 on the file of the Court of the Sub-Divisional 1st Class Magistrate of Chatrapur.*

In re

Penal Code S. 187—*Offence under—Search under S.* 103 *Criminal Procedure Code—Refusal to assist.*

A person who was called upon by a Salt Inspector to assist in a search held under S. 103 of the Code of Criminal Procedure, refused to do so. He was thereupon charged with an offence under S. 187 I. P. C. and convicted. *Held* that the conviction was right.

In re Ramaya Naika [1] distinguished.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code, by the Acting Sessions Judge of Ganjam in his letter dated 13-10-19.

The Public Prosecutor for the Government.

The Court made the following

Order :—We are unable to agree with the learned Sessions Judge that the present case is covered by *In the matter of Ramaya Naika* [1]. What was decided by the Full Bench in that case was that the word *assistance* in the first portion of the section must be read as being *ejusdem generis* with the same word occurring in the latter portion of the section. In the present case, the accused were called upon to assist the Salt Inspector in making a search. Under S. 103 of the Code of Criminal Procedure, he is authorized to call upon the villagers to assist him in the execution of that duty. The last sentence of cl. (2) of S. 103 suggests that while the rendering of assistance in making the search is imperative on the persons called upon to assist, they are not compellable by the Inspector to attend the Court to give evidence without a summons in that behalf. Therefore the duty for discharging which these accused were requisitioned by the Inspector was *ejusdem generis* with that mentioned in the second clause ; consequently, the refusal of the accused to assist the Inspector is an offence punishable under S. 187 I. P. C. The conviction is therefore right. The papers will be returned.

A. V. V.

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* Crl. Rev. Case No. 669 of 1919.
Case Referred No. 63 of 1919. 21st November 1919.

[1] (1903) I. L. R. 26 M. 419.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE KRISHNAN.

Basavanagudi Narayana Kamthy and others ... *Appellants.** (*Defendants 8 to 10.*)

v.

Lingappa Shetty and others ... *Respondents.* (*Plaintiff and defendants 1 to 7.*)

Basavanagudi Narayana Kamthy *v.* Lingappa Shetty.

Easements Act, S. 12—Right to easement—Tenant having a permanent interest on the land, if can acquire a right by prescription in other land of lessor.

A tenant of land, though having a permanent right of tenancy on the land cannot acquire an easement by prescription in other land of his lessor.

Gayford v. *Moffatt* [1] *Mani Chander Chakerbutty* v. *Baikanta Nath Biswas* [2] relied on.

Second Appeal against the Decree of the Court of the Subordinate Judge of South Kanara in appeal Suit No. 212 of 1917 (A. S. No. 174 of 1917 on the file of the District Court) preferred against the decree of the Court of the District Munsif of Mangalore in Original Suit No. 192 of 1915.

A. Krishnaswami Aiyar, for appellants.

B. Sitarama Row, for respondents.

The Court delivered the following

Judgment :—Following the ruling in *Mani Chander Chuckerbutty* v. *Baikunta Nath Biswas* [2] we must hold that the appellants were not in a position to acquire any easement right over the respondents' land as they were his tenants. The fact that the tenants were permanent tenants was held to make no difference on this point in the Calcutta case.

That case is sought to be distinguished on the ground that the Easements Act did not apply to Bengal. But it is not shown how the Easements Act has made any difference on the point. Section 12 of that Act enables only owners of immoveable property to acquire easement rights and not persons who are mere lessees. If a lessee by his user acquires any easement right over another's land he acquires for the benefit of the tenement he is holding and as that belongs to his landlord the benefit will go to the latter, and it follows that such a right could not be acquired or set up against the landlord. The English Law is clear on the point, vide the case cited by the

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* S. A. No. 780 of 1918. 22nd September 1919.

[1] L. R. 4 Ch. App. 133.

[2] (1902) I. L. R. 29 C. 363.

Basavanagudi Narayana Kamthy v. Lingappa Shetty

learned Subordinate Judge *Gayford* v. *Moffatt* [1]. The question whether the land over which the easement is claimed was originally Government land or land belonging to the appellant's landlord is immaterial on the above view. It now admittedly belongs to the latter and any claim by way of easement therefore fails.

It was then suggested that from long enjoyment a grant of an easement right by the landlord at the time of its inception might be presumed. This case was not made in the lower courts and it cannot be allowed to be raised in second Appeal for the first time as plaintiff has not had a proper opportunity to meet it. There is also a difficulty in raising such a presumption if the land over which the right of way is claimed belonged to the Government. Even if it was the landlord's land the mulgeni in favour of the apppellants having been created presumably by a mulgeni document oral evidence adding to its terms cannot be allowed. But it is suggested that this grant may have been subsequent to the grant of the mulgeni right itself. In such a case perhaps the creation of a right of way in the appellants' favour by an oral grant might have been pleaded but such a special case was not set up at all and we cannot allow it now. The second Appeal fails and is dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ABDUR RAHIM, O. C. J., AND MR. JUSTICE ODGERS.

Dundigalla Kesavalu and others	... *Appellants** (*Plaintiffs.*)
v.	
Kalavaguntla Rajaram and others	... *Respondents* (*Defendants Nos. 1 & 3 to 8.*)

Dundigalla Kesavalu v. Kalavaguntla Rajaram.

Limitation, Act, Art. 113—Contract for sale of immoveable property—No time fixed for performance—Purhaser of property in execution sale with notice of the contract—Suit for specific performance—Limitation—Starting point.

On 17-2-1907 the first defendant agreed to sell a house to the plaintiff, no time being fixed for the performance of the contract. The seventh defendant purchased the house in execution of a money-decree on 17—4—1913 with knowledge

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*Appeal No. 422 of 1916. 15th October 1919.

[1] L. R. 4 Ch. App. 133.

Dundigalla Kesavalu v. Kalavaguntla Rajaram.

of the contract. Plaintiff instituted a suit for specific performance on 26—11—1913 within three years of first defendant's refusal to perform the contract. The seventh defendant was not originally made a party to the suit but was added on 22—12—1914 which would be more than 3 years from the date of refusal by the first defendant to perform his contract. It was not alleged or proved that the seventh defendant had refused performance of the contract more than three years before he was impleaded. The Court below dismissed the suit as barred by time against the seventh defendant.

Held, that the suit was instituted within time under art. 113 of the Limitation Act both against the first defendant and the seventh defendant.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada in O. S. No. 115 of 1913.

M. O. Parthasarathi Aiyangar and *M. O. Thirumalachariar*, for Appellants.

T. Ramachandra Rao, A. Krishnaswami Aiyar and *T. D. Ramayya*, for Respondents.

The Court delivered the following

Judgment :—The question of limitation raised in this suit is one of first impression. The suit is for specific performance. The 1st defendant was the person who agreed to sell the plaint house to the plaintiff. This was on 17th February 1907. The 7th defendant bought the property in execution of a money decree against the owner of the property on 17th April 1913. It has been found that he had knowledge of the agreement in favour of the plaintiff. The suit was instituted on 26th November 1913, and that, as found by the Subordinate Judge was within three years of the date of refusal on the part of the 1st defendant to perform the contract. The 7th defendant was not originally made a party to the suit, but was added on the 22nd December 1914, which would be more than three years from the date of refusal to perform the contract on the part of the 1st defendant. The question is whether the suit ought to be dismissed against the 7th defendant as being barred.

Article 113 which is the only article applicable to this case, says that, for suits for spcific performance, the limit of time is three years from the date fixed for the performance (which is not the case here,) or, if no such date is fixed, when the plaintiff has notice that performance is refused. The suit was filed within three years of the refusal to perform the contract; and so far as the 7th defendant is concerned, it is not suggested that he had refused performance of the contract more than three years prior to the date on which he was joined. It is argued that the 7th defendant is a necessary party to the suit, and that the decree must be both against the 1st defendant who entered into the contract and the 7th defendant who purchased the property with notice of the contract. It is not necessary for us to decide whether he is a necessary party or merely a proper party, for even on the supposition that he is a necessary party we do not see how it can be said that the suit is barred as against him unless he is able to show that it has been instituted against him more than three years after the refusal on his part to join in the conveyance to perfect the contract. He is not the person who is primarily the party to perform the contract. He is joined under the provisions of S. 27 of the Specific Relief Act in order that the plaintiff may have full reliefs and may not be driven to a separate suit against him. The plaintiff suing for specific performance may not know to what person the owner of the property has purported to sell it after entering into the contract with him. It would be altogether unreasonable to hold that though the suit was brought within three years from the date of the refusal on the part of the owner of the property who entered into the contract, yet the plaintiff would not be entitled to any remedy against a person who sebsequently bought the property with notice of such contract even though the plaintiff did not know the existence of such a person until after the expiration of three years, or until after the institution of the suit. The result, no doubt, of holding that time is to be reckoned against the purchaser with notice from the date of refusal to perform the contract on the part of the person who entered into the contract of sale except where there has been a refusal on the part of the purchaser with notice within the meaning of the article, would be that the plaintiff would be at liberty to proceed against the purchaser with notice even after three years have expired. But we do not think that such a purchaser has much to complain of. If however, he has been in possession and enjoyment of the property for twelve years, he may plead limitation on that score to any suit for recovery of possession. But that is another matter. We therefore hold that the conclusion of the trial Judge on the question of limitation is wrong.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT :—SIR ABDUR RAHIM, OFFG. CHIEF JUSTICE, MR. JUSTICE OLDFIELD, AND MR. JUSTICE SESHAGIRI AIYAR.

Veyindramuthu Pillai ... *Appellant* * *in all, Respondent Petitioner and Respondent respectively.*

v.

Maya Nadan and another ... *Respondents (Petitioner and Respondent respectively.)*

F. B.

Veyindramuthu Pillai *v.* Maya Nadan.

Civil Procedure Code, S. 47—Appeal, maintainability of—Parties and representatives—Simple-money decree—Mortgage decree—Purchasers in execution—Position of—Contest between rival purchasers in execution of decrees against same judgment-debtor—Decision, if appealable.

The properties in dispute belonged to P. M obtained a money decree against P. in O. S. 733 of 1915, attached the properties in execution on 21-6-1916 and purchased them himself on 27-11-1916. Possession of the properties was delivered to M. on 12-2 1917 and he sold the properties to the petitioner on 28-3 1917. After the attachment in execution of M's decree, one V sued on a mortgage executed by P. of the properties in dispute. V obtained a preliminary decree on 25-9-1916 and a final decree on 11-7-1917. The properties were sold in execution of the mortgage-decree and three items were purchased by V. himself and the remainder by a stranger. The sale was confirmed on 21-1-1918. The purchasers in execution of the mortgage-decree were obstructed in obtaining possession by the petitioner and the Court made an order against the petitioner removing his obstruction The petitioner preferred an appeal to the High Court. On objection being taken to the maintainability of the appeal,

Held by the full Bench that the question was one relating to execution and arising between the parties to the suit and their representatives within the meaning of S. 47 of the C. P. Code and that an appeal lay against the order.

Cases on the subject discussed

Per *Abdur Rahim, O. C. J.* :—A person who has bought the property of the defendant in a suit since the institution of that suit, whether at a court auction held in execution of a money-decree passed in another suit, or by private purchase, is entitled and bound to have any question relating to the execution, discharge or satisfaction of the decree decided under S. 47 C. P. C. by the Court executing the decree when his interest is affected either by the decree itself or by the sale held in execution of that decree and the same rule applies to a purchaser of the property under such sale whether he is the decree-holder himself or a stranger. Whether the purcahser in the one case or the auction-purchaser in the other is to be regarded as the representative of the judgment-debtor or the decree holder depends on the nature of the question raised and who the contesting party is.

Per *Oldfield, J.* : The purchaser in execution of a money-decree is ordinarily the representative of the judgment-debtor. A purchaser from a decree-holder purchaser under a money-decree is the representative of the judgment-debtor for the purpose of enquiry into a question relating to the execution of a distinct decree affecting the same property.

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* A. A. O. Nos. 188, 260 and 315 of 1918. 15th October 1919.

Per *Seshagiri Iyer, J*:—Where the equity of redemption is purchased under a money-decree, in matters relating to the execution of the mortgage-decree the auction-purchaser under the money-decree is the representative of the judgment-debtor in the mortgage-decree.

An auction-purchaser in execution of a money-decree is not the representative of the decree holder.

If the points for decision in an application before the executing court relate to the rival rights of the decree-holder and the judgment-debtor and also relate to the execution, discharge or satisfaction of the decree it should be dealt with in execution and not by separate suit. The right of appeal and second appeal will be governed by the same rules as affect applications under S. 47.

Appeals against the orders of the Court of the Subordinate Judge of Ramnad at Madura in E. A. No. 374 of 1918, in E. A. No. 322 of 1918, in E. P. No. 269 of 1917; in O. S. No. 64 of 1916 (on the file of the Court of the Temporary Subordinate Judge of Ramnad at Madura), in E. A. No. 36 of 1918, in E. P. No. 1 of 1918, in O. S. No. 64, of 1916, (on the file of the Court of the Temporary Subordinate Judge of Ramnad at Madura) and M. P. No. 165 of 1918, in E. A. No. 157 of 1819, in E. P. No. 269of 1917, in O. S. No. 64 of 1916, (on the file of the Court of the Temporary Subordinate Judge of Ramnad at Madura) respectively.

The Court *(Oldfield and Seshagiri Aiyar, JJ.,)* made the following

ORDER OF REFERENCE TO A FULL BENCH :—

Oldfield, J.:—The same preliminary objection has been taken to the hearing of each of these three appeals,that they are not authorized by S. 47 of the Code of Civil Procedure.

The appellant in each is the same individual. But the circumstances differ, except in so far as the same two litigations are in question in each as the origins of the respective titles of the parties. The appellant relies in A. A. O. Nos. 188 and 315 on the sale of part of the suit property to him in execution of a money decree and A. A. O. No. 260 on the sale of part of it to his vendor, the money decree-holder, and contends that for all purposes, including these appeals, he became the representative of the judgment-debtor These sales were however subject to a mortgage. On it, without notice to the money decree-holder and (it is alleged) without his knowledge, between the attachment and sale under the money decree a suit was filed and a preliminary decree was obtained, After the delivery under the money decree, a final decree was passed on the mortgage and

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Veyindramuthu Pillai v. Maya Nadan.

a sale took place. The purchasers of the portions of the property concerned in A. A. O. Nos. 188 and 315 were respectively the mortgage decree-holder and a stranger. They have obtained orders for removal of appellant's obstruction to their possession. A. A. O. No. 260 relates to a sum of money in Court which represents the crop on part of the property and has been awarded by the Lower Court to the mortgage decree-holder purchaser. Shortly the array of the parties in their legal character is as follows :—

A. A. O. No.	Money Decree.		Mortgage Decree.
188	Purchaser	*v.*	Decree-holder purchaser,
315	Purchaser	*v.*	Stranger purchaser,
260	Decree-holder purchaser's vendee.	*v.*	Decree-holder purchaser.

The first point requiring notice is that the parties' rights arose in two distinct litigations and the decision in *Mandavalli Rama Rao* v. *Sivanarayana* [1] gives some support to the view that this fact alone is sufficient to negative appellant's representative character for the present purpose. But that decision is expressed very shortly and it is possible that learned Judges concerned, in fact relied on the broader considerations to be referred to later. In *Muhammad Bava Sahib* v. *Ramachandra Thevar*, [2] it was observed that the purchaser must be a representative for all purposes or none. If there is no objection on other grounds to treating the present appellant as a representative of the judgment-debtor, the fact that he obtained the latter's interest through a Court sale in another execution and not through a private transfer does not appear to affect his rights or to deprive him of the character of a person on whom an interest has devolved within the meaning of Order XXII Rule 10. It is only possible that one distinction may be necessary, and that only in A. A. No. 260, If the controversy had arisen in the execution of the money-decree, it would have been necessary to regard appellant as the representative of the decree-holder, from whom he purchased, in accordance with the decision in *Sandhu Taraganar* v. *Hussain Sahib* [3] and the judgment of Wallis, J., in *N. Narayana Iyengar* v. *Veerabhadra Pillai* [4]. But in those cases only one litigation was in question as an origin of title and the identification of the transferee with the decree-holder was clearly necessary, if the controversy between the latter and the judgment-debtor or his representative was to be settled speedily in execution and a separate suit was to be avoided. In the present case the contrary will be the result, since, as was decided in *Gour Mohun Gouli* v. *Dinonath Karmokar* [5] and as the judgment of

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[1] (1919) 25 M. L. T. 153.

[2] A. S. No. 249 of 1916.

[3] (1904) I. L. R. 28 M. 87.

[4] (1910) I. L. R. 34 M. 417.

[5] (1897) I. L. R. 25 C. 49.

Krishnaswami Aiyar, J., in the case last cited implies, S. 47 does not cover disputes between a party and his representative or between the representatives of the same party. Where, as here, two litigations are in question, the purchase by a decree-holder in one of them and his temporary ownership of the property is material only in it and can have no significance with reference to the right of his transferee of the property to intervene in execution in the other. There would accordingly seem to be no substantial reason against holding that the purchaser in that one from a decree-holder purchaser is for the purpose of execution proceedings in the other the representative, no longer of that decree-holder, but of the common judgment-debtor, to whom his interest is ultimately to be traced. It may therefore be possible and advisable to restrict the effect of *Sandhu Taraganar* v. *Hussain Sahib* [1] in this direction.

The position of the parties in the present cases is however further complicated by the *dicta* of Krishnaswami Aiyar, J., in *N. Narayana Iyengar* v. *Veerabhadra Pillai* [2] already referred to, that "where the decree a is mortgage-decree the purchaser in execution will be the representative of the judgment-debtor and that, where property is attached and sold under a money-decree, a stranger purchasing the property is not the representative even of the judgment-debtor, still less can he be the representative of the decree-holder." These *dicta* were apparently accepted in *Thangavelu Mudaliar* v. *Mahomed Ibrahim Sahib* [3] and were followed, although not specifically mentioned, in *Arasayee Ammal* v. *Sokkalinga Mudaly* [4]. To apply them to the present cases the appellant in A. A. O. Nos. 188 and 315 will not be the representative of either party to the money-decree or of the judgment-debtor either under it or the mortgage-decree ; and the appellant in A.A. O. No. 260 will not be the representative of the judgment-debtor, whose property he has acquired, but with reference to *Sandhu Taraganar* v. *Hussain Sahib* [1] only of the money decree-holder who has no connection with the mortgage proceedings. And accordingly S. 47 will not be applicable to appellant's intervention in those proceedings in any of the cases. It has no doubt been argued before us that, if the purchaser under a money-decree does not represent the judgment-debtor, he must represent the decree-holder. But the answer to this, so far as it is based on authority, is given in *Krishna Satapasti* v. *Sarasvatula Sambasiva Row* [5] and, as it assumes what Krishnaswami Aiyar, J., did not hold, that the purchaser must have some representative character, and as it corresponds with no actual incident of the purchase, it is useless to pursue it further as a reconciliation between the alternative theories. To turn to the other party to these disputes, the person claiming under the mortgage-decree sale, he will, as a stranger, be a representative in A. A. O. No. 315, but of the debtor according to the authority under consideration, whilst in A. A. O. Nos. 188 and 260, as he is himself the decree-holder, no question of representation need be considered.

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[1] (1904) I. L. R. 28 M. 87.

[2] (1910) I. L. R. 34 M. 417.

[3] (1916) 3 L. W. 377.

[4] (1916) 1 M. W. N. 177.

[5] (1908) I. L. R. 31 M. 177.

I have referred to the application to the cases before us of the views of Krishnaswami Aiyar, J., in detail in order to illustrate their effect in instance, typical of a majority of the combinations which can occur. The first result that the purchaser at a money-decree sale cannot be regarded as a representative, entails that disputes, to which he is a party, and they will be a large proportion of those requiring settlement, cannot be dealt with except by separate suit, whether they arise in connection with the execution of that decree or of some other. This is inconsistent with the expressed disposition of the Judicial Committee and other Courts to extend the scope of S. 47. It moreover was not justified by the learned Judge by reference to any principle ; and, where, as he admitted, the purchaser obtains the right of the judgment-debtor in the property, it is, with all respect, impossible to understand how the legal incidents, including the remedies with their approporiate procedure, attached to that right, do not pass with it. And there is no necessity to adhere to this view in order to be consistent with other decisons. For in *Paramananda Das* v. *Mahabeer Dossji* [1], *Kuppana Kavundan* v. *Kumara Kavundan* [2] and the very recent case of *Muhammad Bava Sahib* v. *Ramachandra Thevar*[3] the conclusion was in favour of representation of the judgment-debtor.

The case of a stranger purchaser under a mortgage-decree is similarly dealt with without discussion by Krishnaswamy Aiyar, J. His statement that he is the representative of the judgment-debtor is opposed to the opinion of Moore, J., in *Kasinatha Ayyar* v. *Uthumansa Rowthan* [4]. But that decision was doubted in *Sivarama Sastrial* v. *Somasundra Mudali* [5] and there appears to be nothing further in the authorised reports in this presidency. Here again there is some uncertainty, although less than in the case of a purchaser under a money decree. It is moreover desirable that if an authoritative decision is to be given on this part of the law, the position of purchaser at both descriptions of sales should be settled on identical considerations so far as they are applicable. That an authoritative decision, such as my learned brother and I cannot give, is rendered necessary by the

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1. (1896) I. L. R. 20 M. 378.
2. (1910) I. L. R. 34. M. 450.
3. A. S. No. 249 of 1916.
4. (1901) I. L. R. 25. M. 529.
5. (1904) I. L. R. 28 M. 119.

judgment of Krishnaswami Aiyar, J. in *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai* [1] and the cases, in which it has been followed, admits of no doubt. I therefore refer to a Full Bench, the questions as arising in the case before us:

1. Whether a purchaser at a sale held in execution of a money decree is a representative of a party and, if so, of which party for the purpose of enquiry into a question relating to the execution of (*a*) that money decree (*b*) any other decree affecting the purchased property and against the same judgment-debtor.

2. Whether a purchaser from a decree-holder purchaser under a money decree is a representative of a party for either of these purposes and, if so, of which.

3. Whether a stranger purchaser at a sale in execution of a mortgage decree is the representative of a party and, if so, of which.

Seshagiri Aiyar, J:—I do not wish to express any decided opinion on the cases quoted before us. It is clear that they cannot be reconciled with each other. The recent judgment of the learned Chief Justice and Kumaraswami Sastri, J. in *Muhammed Bava Sahib* v. *Ramachandra Tever* [2] renders it necessary that the whole matter should be fully considered and that a definite rule of law should be laid down for the guidance of the Courts below. One proposition seems to be hardly disputed, namely, that the purchaser who is a decree-holder, is a party to the suit within the meaning of that expression in Section 47 of the Civil Procedure Code. There is considerable divergence of opinion as to whether an auction-purchaser who is not a decree-holder, is a representative of any party to the suit. In this Presidency it seems to have been assumed that he would be the representative of the decree-holder. In Allahabad this view is not accepted. The recent judgment to which I referred, throws doubt upon the earlier Madras cases. It may lead to no violation of any general principle if he is regarded as representative of one party or the other. But it is absolutely necessary that it should be determined authoritatively whose representative he is, if he is a representative at all. I therefore agree that the questions proposed by my learned brother should be referred for the decision of the Full Bench.

T. R. Venkatarama Sastriar for Appellant.

S. T. Srinivasa Gopalachariar for the respondent in A. A. O. No, 188 and 260 of 1918.

K. P. Rama Krishna Aiyar for *A. Chidambaram*, for respondent in A. A. O. No. 315 of 1918.

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[1] (1910) I. L. R. 34 M. 417

[2] A. S. 249 of 1916.

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Abdur Rahim O. C. J.

The Court expressed the following

Opinion :—*The Officiating Chief Justice* :—This is a reference to the Full Bench made in certain appeals against orders which arose under the circumstances mentioned in the order of reference. Briefly speaking, the claims of the decree-holder-purchaser of the disputed property in execution of a money decree and of his vendee having been disallowed as against the purchasers under a mortgage decree, one of them being the decree-holder himself with respect to a part of the property, the purchaser of the other part being a stranger, the question arose whether the order of the lower Court comes within the purview of section 47 of the Code of Civil Procedure and is therefore appealable. The suit on the mortgage was instituted after the attachment in execution of the money decree and the sale under the money decree which was subject to the mortgage was made between the dates of the preliminary mortgage decree and the final decree. I shall proceed on the basis assumed in the order of reference that the question that has arisen relates to execution, discharge, or satisfaction of the decree within the meaning of section 47, and that all that we are asked is whether such a question arose between the parties to the suit in which the decree was passed or their representatives.

As I understand the facts, the question in the appeal arose in execution of the mortgage decree; and, so far as the decree holder-purchaser is concerned, there can be no question of his position as he is a party to the suit.

But the decisions of this Court as to who are to be deemed, within the meaning of section 47 of the Code of Civil Procedure, to be the representatives of the parties to the suit in which the decree which is being executed was passed are in a state of considerable conflict. On the question whether the purchaser can be regarded as the representative of the decree-holder in cases arising between him and the judgment-debtor or his representative, Moore J. had no hesitation in *Kasinatha Ayyar* v. *Uthumansa Rowthan* [1], in holding that the auction-purchaser, even if he was not the decree-holder, was the representative of the judgment-creditor, basing his opinion on the Privy Council ruling in *Prosunno Kumar Sanyal* v. *Kali Das Sayal* [1], and on the full Bench ruling of the Calcutta High Court in *Ishan Chunder Sirkar* v. *Beni Madhub Sirkar* [2], and on that of a Divisional Bench of the same Court in *Duar Buksh Sirkar* v. *Fatic Jali* [3], Bhashyam Aiyangar J., the other learned Judge, did not express any dissent from that view, but pointed out that the order was none the less an order under S. 244 (now Section 47) because it was also passed under sections 318 and 334 of the Code of Civil Procedure (corresponding to Rules 95, 97 and 98 of O. 21 of the Code of Civil Procedure). The ruling was followed by White C. J. and Subramania Aiyar J. in *Sandhu Taraganar* v. *Hussain Sahib* [4], by White C. J. and Sankaran Nair J. in *Arthanari Chettiar* v. *Nagoji Rao* [5], and by Benson und Wallis JJ.in *Manikka Odayan* v.*Rajagopala Pillai*[6]. But the opposite view is expressed by White C. J. sitting with Miller J. in *Krishna Satapasti* v. *Sarasvatula Sambasiva Row* [7], and by Wallis and Krishnaswami Aiyar JJ. in *N. Narayana Iyengar* v. *Veerabhadra Pillai* [8], and has been accepted by Sadasiva Aiyar and Bakewell JJ. in *Subbamma* v. *Chennayya* [9]. In this Court, therefore, the conflict of opinion on the point is such that one could not say that there is a clear preponderance of authority in support of one view rather than the other.

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[1] (1902) I. L. R. 25 M. 529.

As regards the other High Courts it was held by Jenkins C. J. in *Magan Lal* v. *Doshi Mulji* [10] that an auction purchaser could not be regarded as the representative of the decree-holder for the purposes of an application under Section 310 (A) of the Old Code but Order 21, Rule 89 of the New Code now expressly provides that a person owning property which has been sold or holding an interest therein by virtue of a title acquired before such sale may also apply to have the sale set aside on depositing the purchase-money. As regards Calcutta and Allahabad no express ruling on the question has been cited before us and I have not found any.

On the question whether an auction-purchaser can be treated as the representative of the judgment-debtor, we find a

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1. (1892) I L. R. 19 C 683
2. (1896) I. L. R. 24 C, 62.
3. (1898) I. L. R. 26 C. 250.
4. (1904) I. L. R. 28 M. 87.
5. (1912) M. W. N. 513.
6. (1907) I. L. R. 30 M.507.
7. (1908) I. L. R. 31 M. 177.
8. (1910) I. L. R. 34 M. 417.
9. (1917) I. L. R, 41 M. 467.
10. (1901) I. L. R. 25 B. 631.

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similar conflict in *Paramananda Das* v, *Mehabeer Dossji* [1] Subramania Aiyar and Boddam JJ. and in *Sivarama Sastrial* v. *Somasundaram Mudali* [2] Subramania Ayyar and Sankaran Nair JJ, answered the question in the affirmative. But in *N. Narayana Aiyangar* v. *Veerabhadra Pillai* [3] already mentioned to which Wallis C. J. was a party, Krishnaswamy Aiyar J. held that he was not such a representative and this view has been followed by Sadasiva Aiyar and Moore JJ. in *Thangavelu Mudaliar* v. *Mahomed Ibrahim Sahib* [4] and in *Arasayee Ammal* v. *Sokkalinga Mudaly* [5] at least in cases where the decree does not mention or affect the property purchased. In another case reported in *Kuppanna avundan* v. *Kumara Kavundan,* [6] both Wallis and Krishnaswami Aiyar JJ. held that the auction-purchaser would be the representative of the judgment-debtor and in an unreported judgment in *Muhammad Bava Sahib* v. *Ramachandra Tevar* [7] Wallis C. J. sitting with Kumaraswami Sastri J. expressly disapproved of the dictum of Krishnaswami Aiyar J. in *N. Narayana Iyengar* v. *Veerabhadra Pillai* [3] and of the rulings in *Thangavelu Mudaliar* v. *Mohamed Ibrahim Sahib* [4] and *Arasayee Ammal* v. *Sokkalinga* [5] and following *Sivarama Sastrial* v. *Somasundara Mudali,* [2] *Narayanaswami Naik* v. *Seshappier* [8] and *Kuppan Kavandan* v. *Kumara Kavundan* [6]. Though on this aspect of the question also it cannot be said that the law is settled by a long current of decisions in this Court as the learned Chief Justice suggests in the unreported judgment, I agree with him so far that the view that an auction-purchaser of the judgment-debtor's interests in the property in dispute is his representative for the purposes of Section 47 of the Code of Civil Procedure has a preponderance of authority in its favour. As regards the other High Courts, both Calcutta and Allahabad (See *Ishan Chander Sircar* v. *Beni Madhub Sircar* [9] and *Gulzari Lal* v. *Madho Ram* [10]) have finally decided in favour of the view that the word 'representative' when taken with reference to the

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[1] (1896) I. L. R. 20 M. 378.

[2] (1904) I. L, R. 28 M. 117.

[3] (1910) I. L. R. 34 M. 417.

[4] (1916) 3 L. W. 377,

[5] (1916) 1 M. W. N, 287.

[6] (1909) I. L. R. 34 M. 450.

[7] A. S. No. 249 of 1916,

[8] (1907) 17 M. L. J, 321.

[9] (1896) I. L. R. 24 Cal. 62.

[10] (1904) I. L. R. 26 All. 447.

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judgment-debtor does not mean only his legal representative that is, his heir, executor or administrator, but it means his representative in interest and includes a purchaser of his interest whether by a private sale or at court auction, who, so far as such interest is concerned, is bound by the decree. In Allahabad, (*Madho Das* v. *Ramji Patak* [1]) and probably also in Calcutta, the purchaser would not be regarded as the representative of the judgment-debtor except in cases where the property purchased by him is involved in the decree in the course of execution of which the question has arisen. But except in *Arasayee Ammal* v. *Sokkalinga Mudali* [2] this distinction does not appear to have been drawn in the rulings of our Court. A recent Full Bench of the Bombay High Court in *Narsinhabhat* v. *Bando Krishna* [3] has ruled contrary to the view of the law as laid down by the Calcutta and Allahabad Full Benches.

Now, the Code has not defined the word ' representative ' though it has defined the phrase ' legal representative'. But that the two terms are not used in a synonymous sense is obvious, for while in section 47 the legislature uses the word ' representative ' it uses the phrase ' legal representative ', as it were by contrast, in sections 50 and 52 and so on. Nor can there be any doubt that the word ' representative ' was intended to have a wider meaning than 'legal representative'.

I think some light can be obtained on this question if we find out in what matters the purchaser of the interest of the judgment-debtor in property sold in execution can apply to the executing Court for redress or can be proceeded against in that Court. Under section 64 an alienation after attachment is void as against all claims enforceable under the attachment. Under section 74 where the purchaser has been obstructed in obtaining possession by the judgment-debtor or by any one on his behalf, the latter can be dealt with by the Court at the instance of the decree-holder or purchaser. Then we find under Order XXI, Rule 35 that under a decree for delivery of immoveable property possession may be given by the Court executing the decree by removing any person bound by the decree which would apparently include a purchaser

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[1] (1884) I. L. R .6 All. 286.

[2] (1916) 1 M. W. N. 289.

[3] (1918) I. L. R. 42 Bom. 411.

pendente lite. This seems to be made clear by the fact that under rule 54 which provides for attachment of immoveable property persons are prohibited from taking any benefit under any transfer made after attachment. In the case of a person who claims a title to the property either independently of the defendant in the suit or if from the defendant, he asserts a title anterior to the institution of the suit in which the decree under execution was passed, his claim is placed on a different basis by the legislature. If such a person is in possession of the property the Court executing the decree cannot dispossess him and his right to establish his title by a separate suit is expressly recognised. See Order 21 rules 58, 63, 99, 100 and 101. By rule 89 an application to set aside a sale by depositing the purchase money may be made by any person owning the property or holding an interest in the property under a title acquired before sale, and such an application would clearly be one between the judgment-debtor or a person who has acquired his interest on the one hand and the decree-holder and the purchaser under the decree on the other. It further says that the judgment-debtor's liability for costs will not be affected by such application. By rule 90 an application to set aside the sale on the ground of irregularity may be made by the decree-holder or any person entitled to rateable distribution or a person whose interests are affected by the sale and to such an application the purchaser would clearly be a necessary party and questions arising under the application may have to be determined between him and the decree-holder or the judgment debtor as the case may be. The purchaser may himself apply to have the sale set aside on the ground that the judgment-debtor had no saleable interest and only on questions raised under rules 89,90 or 91 being decided in favour of the purchaser that the sale will be confirmed. The purchaser can apply for the delivery of the property purchased by him as against the judgment debtor or against any person claiming under a title created by the judgment-debtor subsequently to the attachment. If the holder of a decree for possession of immoveable property or the purchaser of any such property sold in execution of a decree is obstructed in obtaining possession that is a matter to be investigated by the executing Court. If the resistance or obstruction is by the judgment-debtor or by a transferee from him after the institution of the suit in which the decree was passed, in that case the question is to be decided finally in execution. On the other hand if the obstructor is a *bonafide* claimant claiming under a title independent of the judgment-debtor then, as already mentioned, he would have a right to sue in spite of the decision in execution.

I think these provisions of the Code show that the legislature intended that all questions affecting a purchaser of the interest of the judgment-debtor in property which is either affected by the decree or is sold under a decree, are to be decided.in execution between parties interested if the purchase was after the institution of the suit, whether at a private sale or at a sale in execution of a money decree against the defendant. I may here also refer to section 146 which says that "Save as otherwise provided by this code, or by any law for the time being in force, where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him." Under this section the claim is not confined to an interest in property. It seems to me that the purchaser of property in execution of a decree may well be said to claim under the decree-holder for the purposes of proceedings under section 47 in which his rights are affected. It may also here be pointed out that the law, so far as the rulings of this Court and also of Calcutta High Court go is settled that not only the assignee of a decree-holder comes within the scope of S. 47 but a person attaching the decree is the representative of the decree-holder within the meaning of this section—See *Sah Man Mull* v. *Kanagasabapathi* [1], *Krishnan* v. *Venkatapathi Chetty*[2] *Peary Mohunchowdhry* v. *Romesh Chunder Nundy* [3]. I do not see how the case of a purchaser in execution of a decree can well be distinguished on principle. On the other hand where the interest of the purchaser of property either in execution of the same decree or of another decree is affected by any question raised in execution by the holder of the decree .under execution the purchaser is entitled to defend his interest as a person claiming under the judgment-debtor. As has been pointed out time after time by the Privy Council as well as by the High Courts, section 47, corresponding to the old S. 244, should be interpreted in as liberal a spirit as the language would reasonably admit of. I would therefore have little hesitation in holding that the word 'representative' is not intended to be confined to legal representative but is used in the wider sense indicated in *Krishna Bhupati Devu* v. *Vikrama Deo* [1]. "It is a well-known principle that a purchaser in a Court-sale represents the judgment-debtor to the extent of the right, title and interest as he had in the property purchased at the date of sale and represents the execution creditor, in so far as he had a right to bring such right, title and interest to sale in satisfaction of the decree." This principle was laid down by Muttusami Ayyar and Best JJ. in holding that the purchaser was a party claiming under the execution creditor within the meaning of S. 13 of the old Civil Procedure Code; and there was thus privity of law between the two. No doubt the learned judges with reference to some cases cited against that proposition dismissed them with the remark that they were cases under S. 244 and not under S. 13 but they were not considering any question under the former section. I do not see why the principle should not be applied to S. 47 of the Code of Civil Procedure as well.

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[1] (1892) I. L. R. 16 Mad. 20.

[2] (1905) I. L. R. 29 Mad. 318.

[3] (1888) I. L. R. 15 Cal 371.

The question however seems to be concluded by the ruling of the Privy Council in *Prosunno Kumar Sanyal* v. *Kasi Das Sanyal*, [2] where their Lordships say "It is of the utmost importance that all objections to the execution sale should be disposed of as cheaply and as speedily as possible and their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of S. 244, and that when a question has arisen as to execution, discharge, or satisfaction, of the decree between the parties to the suit in which the decree was passed, the fact that the purchaser who is not a party to the suit, is interested in the result has never been held a bar to the application of the section". Their Lordships in laying down the law in these terms observed that as the respondent was not represented before them they had examined the rulings of the Indian High Courts for themselves; and they also mention that Mr. Doyne who appeared for the appellant admitted before them that it was the common practice to make the auction-purchaser a party to an application for setting aside an execution-sale : in that case the appellant wanted by a suit to have the judicial sale of the Zamindari set aside on the ground of fraud on the part of the decree-holder and it was held that the question was determinable by virtue of S. 244 only by an order of the Court executing the decree and not by a separate suit. No doubt their Lordships do not say that the auction-purchaser would be a representative of either the judgment-debtor or the decree-holder within the meaning of S. 244 but they clearly intended to lay down that as a party most interested in the result he would be entitled to be heard in any application under S. 244 and that if the question was one of the character described therein, *i. e.*, relating to the execution, discharge or satisfaction of the decree, then it must be determined by a proceeding under that section in which the auction-purchaser must be joined. In *Magan Lal* and *Doshi Mulji*[1] abovementioned it is observed that the Privy Council could not have intended to delete the words " arising between the parties to the suit in which the decree was passed or their representatives " from S. 244. But there seems to be no inconsistency if I may respectfully say so, in holding that that the question was one arising between the parties although an auction-purchaser who was most interested in the dispute was entitled and bound to ask for a decision by the court executing the decree. Otherwise the result would be that the judgment-debtor and the decree-holder would be bound to have the question settled by the executing court and so far as the purchaser was concerned a fresh decision would have to be obtained by a separate suit.

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[1] (1894) I. L. R. 18. Mad. 13 at 18.

[2] (1892) I. L.R. 19 Cal 683.

The law, therefore, in my opinion, is that a person who has bought the property of the defendant in a suit since the institution of that suit, whether at a court auction held in execution of a money-decree passed in another suit or by private purchase, is entitled and bound to have any question

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1. (1901) I. L. R. 25 B. 631.

relating to the execution, discharge or satisfaction of the decree decided under S. 47 by the court executing the decree when his interest is affected either by the decree itself or by the sale held in execution of that decree and the same rule applies to a purchaser of the property under such sale whether he is the decree-holder himself or a stranger Whether the purchaser in the one case or the auction-purchaser in the other is to be regarded as the representative of the judgment-debtor or the decree-holder depends upon the nature of the question raised and who the contesting party is. This is in accordance with the view of the law adopted in *Kasinatha Iyer* v. *Uthumansa Rowthan* [1] *Sandhu Taraganar* v. *Hussain Sahib* [2] *Arthanari Chettiar* v. *Nagoji* [3] *Manicka Odayar* v. *Rajagopala Pillai* [4] *Paramananda Das* v. *Mahabeer Dasjee* [5] *Linga Reddy* v. *Hussian Reddy* [6], *N. Narayana Aiyangar* v. *Veerabhadra Pillai* [7], *Krishna Satapasti* v. *Sarasavattula Sambasiva Rao* *uppanna Kavundan* v. *Kumara Kavundan* [9] and the unreported judgment in appeal No. 249 ot 1916 and is opposed to *Subbamma* v. *Chennayya* [10], *Thangavalu Mudaliar* v. *Mahomed Ibrahim Sahib* [11] *Arasayee Ammall* v. *Sokkallinga Mudali* [12] and the latter rulings to that extent must be considered to be overruled.

Oldfield, J.,

Oldfield, J. :—It is clear that the questions before us were framed on the assumption that the applicability of S. 47 of the Code of Civil Procedure to the cases before the Subordinate Judge can be disputed only on the ground that some of those who contested them were neither parties (that is not alleged) nor their representatives ; and in particular that the stranger purchaser referred to in the third question at the Court-sale in connection with which these proceedings have arisen must be regarded as the representative of one party or other to the decree under execution, if S. 47 is to be applied. That assumption, I agree with the learned Chief Justice, must be rejected, because, as the Judicial Committee held in *Prosunno*

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1. (1912) I. L. R. 25 Mad 529.
2. (1907) I L.R. 28 Mad. 87.
3. (1912) M. W. N. 513
4. (1907) I. L.R. 30 Mad. 507.
5. (1897) I. L. R. 20 Mad. 878
6. (1904) I. L.R. 28 Mad. 117.
7. (1910) I. L. R. 34. Mad, 450.
8. (1908) I. L.R. 31 Mad. 177.
9. (1910) I. L. R. 34. Mad. 417.
10. (1917) I. L.R. 41 Mad 467.
11. (1916) 3 L. W. 377.
12. (1916) I. M. W. N. 287.

Kumar Sanyal v. *Kasi Das Sanyal*[1] the auction-purchaser's inclusion in the proceedings is justifiable on the ground of his interest in their result and without reference to his possession of a representative character. In fact there was in that case, as I understand it, no attempt to decide whether he had one; and, if the judgment in *Maganlal* v. *Doshi Mulji*[2] assumes such a decision, I would respectfully dissent from it. The Committee regarded it as sufficient to attract the application of S. 47 that a question relating to execution had arisen between the parties to the decree, without reference to the purchaser's inclusion in the proceedings. It need only be added that in order to the arising of such question, it is not essential that all the parties to the decree should actually be impleaded in the proceedings, in which it is raised. For, although I deprecate the common practice, which is exemplified by the cases before us, of failing to implead in such proceedings either the decree-holder or the judgment-debtor, the nature of the question to be dealt with cannot be affected by their absence. In the cases before us the terms of the reference assume and it is evident that a question relating to the execution of the decree has arisen. It is therefore unnecessary to answer the third question referred directly or otherwise than by saying that the inclusion of the auction-purchaser as a party to proceedings relating to an auction-sale does not make S. 47, inapplicable to them.

The foregoing, of course, supplies no answer to the other questions referred, in which the representative character of the other contesting party in the cases before us, the purchaser in execution of a previous money-decree or his transferee, is in issue. For the connection of either with the proceedings in execution of the mortgage-decree, in which the dispute to be adjudicated on has arisen, is indirect and their interest in the result of these proceedings accrued to them independently of the sale, which they impugn. And accordingly, so far as they are concerned, their possession of a representative character must be established, if S. 47 is to be applied. It is not suggested that they can be regarded as the representatives of the holder of the decree under execution in the present proceedings since he had no connection with the Court-sale and private sale

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1. (1892) I. L. R. 19 C. 683.
2. (1901) I. L. R. 25 Bom. 631.

under which they claim. The conclusion will therefore depend on whether they represent the judgment-debtor in these proceedings, who is also the judgment-debtor under the money-decree in execution of which that sale was held. It appeared, it may be observed, in the course of argument that the statement of the parties' characters in my order of reference was inaccurate, in as much as in all these appeals and not only in Appeal Against Order No. 260, the contesting party was the vendee of the decree-holder purchaser under the money-decree. This however authorizes hardly any restriction of the discussion of the general principle involved. For the three alternatives have still to be considered, that the purchaser represents (1) no one or (2) the judgment-debtor or (3) the money decree-holder, either because he in fact derived title from him or on other grounds.

It does not seem to me that any detailed discussion of the numerous decisions enumerated in the judgment just delivered is called for, since the conflict between them is for the most part beyond reconciliation. On two points however there is a distinct preponderance of authority in this Court; and I therefore take it as settled law that the representative mentioned in S. 47 is not to be identified with a legal representative as defined in S. 2 (11) and that a purchaser at Court-auction represents some one, *i. e.*, either the judgment-debtor or the decree-holder. For although the latter conclusion is contrary to the *dictum* of Krishnaswami Aiyar, J., in *Nadumuni Narayana Aiyangar* v. *Veerubhadra Pillay* [1] and the cases from unauthorized reports, in which it is followed, to which my order of reference refers, it is as I have pointed out there, unsupported by reference to principle and irreconcilable with another portion of the learned Judge's judgment and other earlier and later decisions.

The question is then whether the purchaser is the representative of the judgement-debtor or decree-holder ; and it is sufficient for the present reference to deal with it as regards money-decrees only and without regard to the special and more difficult considerations arising in connection with sale under mortgage-decrees, by which the interest of the mortgagee-decree-

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1. (1910) I. L. R. 34 M. 417.

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Oldfield, J.,

holder as well as the equity of redemption is ordinarily transferred. As regards money-decrees it seems to me very difficult, if not impossible, to imagine a case, in which the purchaser can become the representative of the decree-holder. The *dictum* of Moore, J., in *Kasinatha Iyer* v. *Uthumansa Rowthan* [1] was *obiter*, the fact that the auction-purchaser was the decree-holder affording. as he points out, an alternative ground for his decision ; and the sale was in execution of a mortgage-decree and was therefore subject to the considerations above referred to. In *Sandhu Taraganar* v. *Hussain Sahib* [2] the question arose regarding a purchaser from the decree-holder purchaser at the Court sale; and in that case and *Manicka Odayan* v. *Rajagopala Pillai* (3) the Court sale was held under the decree, in the execution of which the application of S. 47 was proposed. Of the decisions relied on by Moore, J., in *Sandhu Taraganar* v. *Hussain Sahib* [2], *Prosunna Kumar Sanyal* v. *Kasi Das Sanyal* [4] has already been referred to, whilst *Ishanchander Sircar* v. *Beni Madhub Sircar* [5] does not, with all due deference, support him and *Duar Buhsh Sircar* v. *Fatik Jali* [6] deals with the transferee from a decree-holder of his decree, not of what he had purchased in execution of it. On the other hand, as the learned Chief Justice has shown the purchaser at a Court sale has been regarded,so far as appears, on general grounds,as the representative of the judgment-debtor in *Krishna Satapasti* v. *Saraswatula Sambasiva Rao* [7] and *Subbamma* v. *Charnayya* [8]. Apart from authority the fact recognized by Krishnaswami Aiyar, J., in *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai* (9) that the purchaser succeeds to the judgment-debtor's rights in the property sold, would ordinarily be sufficient to constitute him his representative in interest, at least in proceedings regarding that property ; and the only argument suggested to the contrary, that the purchaser and decree-holder are both interested to support the sale, at which the purchase was made, appears to assume, what is not the case, that they both have or have had in succession an identical interest in the property sold.

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1. (1901) I. L. R. 25 Mad. 529.
2. (1904) I. L. R. 28 Mad. 87.
3. (1907) I. L. R. 30 Mad. 507.
4. (1892) I. L. R. 19 Cal. 683.
5. (1896) I. L. R. 24 Cal. 62.
6. (1898) I. L. R. 26 Cal. 250.
7. (1907) I. L. R. 31 Mad. 177.
8. (1917) I. L. R. 41 Mad. 467.
9. (1910) I. L. R. 34 M. 417.

Holding that the purchaser in execution of a money-decree is ordinarily the representative of the judgment-debtor, I consider next whether he is so, when as in the cases before us, he is also the decree-holder and when his position comes in question in a distinct proceedings. It may be pointed out that, where his position does not so come in question, the fact that he is the purchaser does not, consistently with the reference already made to *Prosunno Kumar Sanyal* v. *Kasi Das Sanyal* [1] require consideration. When it does, it seems to me that his character as decree-holder in one execution can have no effect on his position in another and that there is nothing in authority or on principle to debar us from treating him like any other stranger to the latter, no reason appearing for according him any other rights than a stranger purchaser from the judgment-debtor, whether by execution or private sale, would acquire.

The foregoing entails that the purchaser from a decree-holder purchaser under a money-decree is the representative of the judgment-debtor for the purpose of enquiry into a question relating to the execution of a distinct decree affecting the same property. I would answer the second question referred accordingly. An answer to the first question is not necessary.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J. :—Before dealing with the questions referred a short statement of facts may not be out of place. The property in suit belongs to one P. P. Maya Nadar. One Muthuswamy sued him in O. S. No. 733 of 1915 and obtained a money-decree on the 6th of January 1916. In pursuance of that decree the properties were attached on the 21st of June 1916. They were sold on the 24th of October of the same year, purchased by the decree-holder, and the sale was confirmed on the 27th of November 1916. The property was delivered on the 12th of February 1917. The decree-holder purchaser sold the property privately on the 28th of March 1917 to the present appellant. That is the history of one stage of the proceedings. After the attachment under the money-decree one M. V. Nadan brought a suit on a mortgage executed by P. P. M. Nadar on the 14th of July 1916. He obtained a preliminary decree on the 25th of September 1916. The final

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[1] (1892) I. L. R. 19 C. 683.

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decree was on the 11th of July 1917. The property was sold on the 17th of December 1917; three items out of four were purchased by the decree-holder himself, and the 4th item by one Subbiah Nadan a stranger. The sale was confirmed on the 21st of January 1918. The purchasers under the mortgage-decree in endeavouring to take possession were obstructed by the purchaser under the money-decree. Thereupon they applied for the removal of the obstruction. The lower Court held that the purchase under the money-decree was affected by the doctrine of *lis pendens* as the sale was subsequent to the institution of the mortgage suit. The present appeals are by the representatives of the purchaser under the money-decree against the order of the lower Court directing possession to be given to the purchasers under the mortgage-decree.

A preliminary objection was taken that no appeal lies because the purchaser under the money-decree cannot be regarded as a representative of any of the parties to the decree. It was under these circumstances the three questions have been referred for the opinion of the Full Bench.

Upon one question there was no contest. It was conceded by the counsel for the respondent that where the equity of redemption is purchased under a money decree, in matters relating to execution of a mortgage-decree, the auction-purchaser under the money-decree will be the representative of the judgment-debtor in the mortgage-decree. This matter apart from concession has been definitely decided by the Full Bench of the Calcutta High Court in *Ishanchander Sirkar* v. *Benimadhub Sirkar* [1] and by the Full Bench of the Allahabad High Court in *Gulzari Lal* v. *Madho Lal* [2]. In the first of these decisions it was held that the decision of the Judicial Committee in *Radha Madhub Holdar* v. *Manohar Mookerji* [3] is only consistent with the view that the auction-purchaser is the representative of the judgment-debtor. Although the point was not expressly decided by the Board, I respectfully concur with the view taken in Calcutta that that decision is authority for the proposition enunciated. It is true in Bombay they have held that the auction-purchaser is the representative of neither

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1. (1896) I. L. R. 24 C. 62.
2. (1904) I. L. R. 26 All. 447.
3. (1888) 15 Cal. 756.

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the decree-holder nor of the judgment-debtor; and in the latest decision of that Court in *Narasinbhat* v. *Bundo Krishna* [1] it was held that he is not a representative of the judgment-debtor. But having regard to the decisions of the Judicial Committee and of the two Full Bench cases referred to by me, I am of opinion that the auction-purchaser represents the judgment-debtor in questions relating to the execution of decree in the second suit on the mortgage. But the question whether in the same suit he would be the representative of the judgment-debtor is not quite settled. I shall not discuss the authorities bearing thereon as in the view I am taking the discussion would be unnecessary. Before proceeding further I might state that the view that the auction-purchaser is the representative of the decree-holder has not been accepted in Calcutta or in Allahabad. It is certainly not the law in Bombay. In this Presidency the weight of authority is against making him representative of the decree-holder. *Krishna Satapasti* v. *Saraswatula Sambasiva Rao* [2] *Nadamuni Narayana Aiyangar* v. *Veerabhudra Pillai* [3] *Subbamma* v. *Channayya* [4] take that view. On the other hand, we have *Manicka Odayan* v. *Rajagopala Pillai* [5] and *Arthanari Chettiar* v. *Nagoji Rao* [6] in favour of regarding the auction-purchaser as the representative of the decree-holder. On principle it seems to me that this latter view is wrong. He is certainly not a representative-in-interest. Because beyond being the instrument for bringing the property of the judgment-debtor to sale, ordinarily speaking, a decree-holder does not transmit any of his rights to the auction-purchaser. I can understand his legal representative standing in his shoes. I can understand his assignee or other heir prosecuting his right. But I am unable to hold that an auction-purchaser represents the decree-holder. On the motion of the decree-holder the Court proceeds to sell the property of the judgment-debtor and the principle of *Caveat Emptor* has been applied to purchases so made. The only provision in the Code of Civil Procedure which affects the decree-holder is that which provides for an application by the auction-purchaser for a refund of the money from the decree-holder in case the sale is set aside. I am therefore unable to accept those decisions which hold that he is a representative of the decree-holder, as correct.

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[1] (1918) I. L. R. 42 B. 411

[2] (1908) I. L. R. 31 Mad. 177.

[3] (1910) I. L. R. 34 Mad. 417.

[4] (1917) I. L. R. 41 Mad. 467.

[5] (1907) I. L. R. 30 Mad. 507.

[6] (1912) M. W. N. 513.

But I think all these difficulties may be overcome by a legitimate application of the principle enunciated in *Prosunno Kumar Sanyal* v. *Kasi Das Sanyal* [1]. In that case a suit was brought by a judgment-debtor for setting aside the sale of his property on the ground that the decree-holder acted fraudulently. The auction-purchaser at the execution sale was made a defendant. When the matter finally went before the Judicial Committee their Lordships said :—" Mr. Doyne, who appeared for the appellants, admitted that the question at issue was one relating to ' execution, discharge, or satisfaction of the decree.' But he argued with much ingenuity that the suit, was not barred by the provisions of S. 244, because the question concerned the auction-purchasers *as much as anybody* (the italics are mine) and therefore, as he contended, it could not properly be described as a question " arising between the parties to the suit in which the decree was passed." Their Lordships say further on. " It is of the utmost importance that all objections to execution sales should be disposed of as cheaply and as speedily as possible. Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of S. 244, and that, when a question has arisen as to the *execution, discharge or satisfaction of a decree between the parties to the suit* (the italics are mine) in which a decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section." This statement shows that what the courts have to see is whether the issues arising for decision relate (*a*) to execution ; (*b*) to deciding rival rights of the decree-holder and of the judgment-debtor, in the subject-matter. If those conditions are satisfied, the fact that others are interested in the result of the decision should not affect the jurisdiction and competency of the executing court to deal with the matter. Their Lordships lay special emphasis on the cheapness and speediness of remedies expected of an application in execution. If we turn to the language of S. 47 which corresponds to S. 244 of the Code of 1882

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[1] (1892) I. L. R. 19 Cal. 683.

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the same result would appear to follow. The section lays down only two conditions which have been insisted on by the Judicial Committee. It does not describe who the parties to the execution application should be. The obvious object of the legislature was that once a matter has been adjudicated upon by a regular trial, question affecting the same matter should as far as possible be dealt with in the execution department. In very many cases the same Judicial Officer may have to deal with the matters in execution : that would be a distinct advantage. Further the parties will be saved considerable expense if the question is dealt with in execution. I am therefore of opinion that as extended an application should be given to the rule enunciated by the Judicial Committee as is consistent with the language of S. 47. In *Ganapathi Mudaliar* v. *Krishnamachariar* [1] another decision of the Judicial Committee they reiterated the principle enunciated in *Prosunno Kumar Sanyal* v. *Kasi Das Sanyal* [2]. In *Krishna Bhupati Deveu* v. *Vikrama Deo* [3] this view seems to have found favour with the learned Judges. In *Magan Lal* v. *Doshi Mulji* [4] there are observations of Sir Lawrence Jenkins which may be regarded as enunciating the same principle. The rule itself is so eminently a workable one and steers clear of many difficulties which have sprung round the application of S. 47 that in my opinion, both the letter of the law and the reason of it demand that this principle should be given wide effect by Courts in this country. I would therefore answer all the questions referred to us by saying that if the points for decision in an application before the executing Court relate to the rival rights of the decree-holder and of the judgment-debtor and also relate to execution, discharge, or satisfaction of the decree it should be dealt with in execution and not by separate suit. The right of appeal and second appeal will be governed by the same rules as affect application under S. 47.

A. V. V.

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1. (1918) I. L. R 41 Mad 403.
2. (1892) I. L. R. 19 Cal. 683.
3. (1982) I. L. R. 18 Mad 13.
4. (1901) I. L. R. 25 Bom. 631.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ABDUR RAHIM, OFFICIATING CHIEF JUSTICE AND MR. JUSTICE ODGERS.

Thammanna Chinna Lakshiminarasimham and another ... ... *Appellants** (*Defendants Nos. 2 & 3.*)

v.

Messrs. Akarapu Venkanna Chenniah a firm of merchants, carrying on business at No. 140 Mint Street, Georgetown, Madras ... ... *Respondents* (*Plaintiffs*).

Thammanna Chinna Lakshimi-narasimham *v.* Akarapu Venkanna Chinniah.

Hindu Law—Joint family—Ancestral trade—Debts contracted by manager—Liability of minor members.

In the case of trading families like the Komati Chetties, if moneys are borrowed for the purpose of an ancestral business carried on by the members of the joint family, all the members of the family including minors are liable for the repayment of such sums, to the extent of their share in the whole family property including the assets of the business.

Malaiperumal Chettiar v. *Arunachella Chettiar* [1], *Muthiya Pillai* v. *Tinnevelly South Indian Bank* [2] Relied on.

Sanka Krishna Murti v. *The Bank of Burma* [3] distinguished.

Appeal against the decree of the City Civil Court, Madras, in O. S. No. 334 of 1917.

P. Somasundaram, for Appellant.

Venkatasubba Rao and *Radhakrishna*, for Respondents.

The Court delivered the following

Judgment:—It is argued in this appeal that the 1st defendant on the one hand and the 2nd and 3rd defendants on the other settled their accounts and divided their business sometime in 1908 and therefore the appellants are not liable for any debts incurred in the course of the business since that date. The learned trial Judge has however found that this is not proved by the evidence and he gives strong reasons for his conclusions. Besides it is not suggested that if there was any division so far as this business was concerned, that the plaintiffs either knew of such a division or were informed of it.

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* C. C. C. Appeal No. 4 of 1919. 8th September 1919.

[1] (1917) 6 L. W. 417.

[2] (1916) 5 L. W. 341.

[3] (1911) I. L. R. 35 M. 692=21 M. L. J. 508.

The next question argued is one of law, namely, whether the decree is right in so far as it makes the appellants' (2nd and 3rd defendants') shares in the family property liable for the amount of the decree. They were minors at the time of the transaction which gave raise to the debt, but it is found and not disputed that the trade in the course of which the debts were incurred was an ancestral family trade, the defendants being Komati Chetties. The argument on behalf of the appellant is that the shares of the appellants in the assets of the business are alone liable and reliance is placed in this connection on the rulings of this court in *The Official Assignee of Madras* v. *Palaniappa Chetty,*[1] and *Sanka Krishnamurthi* v. *The Bank of Burma*[2] and on the decisions of the Bombay High Court in *Raghunathji Tarachand* v. *The Bank of Bombay*[3] and *Sakrabhai* v. *Maganlal*[4], The ruling in *The Official Assignee of Madraf* v. *Palaniappa Chetty*[1] was by a Full Bench of this Court and does not contain anything which can be said to support the proposition put forward on behalf of the appellants. As regards *Sanka Krishnamurthi* v. *The Bank os Burma*[2] it does not appear to be very clear whether the learned Chief Justice intended to lay down any general proposition that in the case of an ancestral family business belonging to a trading family such as this, debts incurred in the course of such business are recoverable only from the shares in the assets of that business belonging to the minor members of the family and not from their shares in the family property including the assets of the business. In any case, as pointed out in *Malaiperumal Chettiar* v. *Arunachala Chettiar*[5] by Ayling and Sadasiva Aiyar, JJ., the question did not arise for decision upon the facts found in that case and the statement which by no means is very clear on this point was by way of obiter. On the other hand we have a number of rulings which clearly are against the contention of the appellants. It is laid down in *Muthaya Pillai v. Tinnevelly South Indian Bank,*[6] that where money was borrowed for the purpose of an ancestral business carried on by the members of a joint Hindu family,

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[1] (1918) I.L.R. 41 Mad. 824=35 M.L.J. 473.
[2] (1911) I. L. R. 35 Mad. 692.
[3] (1909) I.L.R. in 34 Bom. 72.
[4] (1901) I. L. R. 26 Bom. 206.
[5] (1917) 6 L. W. 417.
[6] (1916) 5 L. W. 341.

Thammanna Chinna Lakshiminarasimham v. Akarapu Venkanna Chinniah.

all the members of the family including the minors are liable for the repayment of such money to the extent of their share in the family property as distinguished from their share in the *assets of the business* because the family property is swelled by the profits of the trade which is carried on with the credit of the entire family property. This view of the law is followed in the case just referred to in *Malaiperumal Chettiar* v. *Arunachala Chettiar* 1 where it is also laid down that the ordinary presumption in the case of such business is that the entire family property is embarked in the business and forms part of the assets of the business. In *Dulipalla Kanakam* v. *Maddipalli Venkataraju* 2 Seshagiri Aiyar and Napier, JJ. also acted upon this view of the law. With reference to the ruling of the Bombay High Court in *Ragunathji Tarachand* v. *Bank of Bombay* 3, it seems to have been conceded by the Counsel for the respondents that the personal decree given by Heaton, J. against the minor was wrong and the decree was modified in accordance with that concession. But in the body of the judgment delivered by Mr. Justice Chandavarkar, the well known case in *Ramlal Thakursidas* v. *Lakshmi Chand Muniram* 4, is cited with approval as laying down the law on the subject of family trades and there it is distinctly ruled that "where a minor is a coparcener in a joint family, his share in the family property is liable for debts contracted by his managing coparcener for any family purpose or any purpose incidental to it. If the family is a trading firm, the same rule must apply with this difference that the term *family purpose* or *purpose incidental to it* must here give way to the expression trading purpose or purpose incidental to it, having regard to the nature and objects of the family business." This exposition of the law has been followed as pointed out in *Kutti Haji* v. *Kunhi Haji* 5 by all the High Courts and the learned Chief Justice himself cites this case with approval in *Sanka Krishnamurthi* v. *Bank of Burma* 6 We hold that the decree of the City Civil Judge is right on this point as well.

The appeal must be dismissed with costs.

A. V. V.

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1. (1917) 6 L. W. 417.
2. (1917) 7 L. W. 218.
3. (1909) I. L. R. 34 Bom. 72.
4. (1861) 1 Bom. H. C. R. Appx. 51.
5. (1919) I. L. R. 42 Mad. 761=37 M. L. J. 316.
6. (1911) I. L. R. 35 M. 692.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ABDUR RAHIM, OFFICIATING CHIEF JUSTICE, MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE BURN.

In the matter of K. Venkata Row, First Grade Pleader, Bellary.

In the matter of a First Grade Pleader.

Legal Practitioners Act, S. 13 (b) and (f)—Pleader—Misconduct—Application for appointment as guardian of minor's properties—Guardian directed to furnish security—Pleader advising client to pay moneys from minor's estate to the sureties as consideration for suretyship—Propriety of the transaction.

The father of a minor Hindu widow applied to the court to be appointed guardian of her properties. Being unable to find the required security, he sought the advice of a pleader who directed him to two other persons who consented to become sureties under an agreement by which a portion of the income of the minor's estate was to go to them for four years as consideration for their suretyship. It appeared that in case the father of the minor was not appointed guardian, a salaried guardian would have been appointed by the court and in view of this contingency, the agreement between the guardian and the sureties was not detrimental to the interest of the minors. Moreover there was nothing to show that the pleader in advising the guardian to enter into the agreement with the sureties, did not believe it to be a proper transaction and one that was beneficial to the minor.

Held, on these facts, that there was no cause for proceeding against the pleader under S. 13 (*b*) or (*f*) of the Legal Practitioners Act.

Re Lucas Pan v *Blair* [1] Ref. *Fateh Singh* v. *Sanwal Singh* [2] Dist.

Case stated under S. 14 of the Legal Practitioners Act by the District Judge of Bellary.

The Hon. The Advocate-General, for the Pleadership Board.

E. L. Thornton and *C. Sambasiva Rao* for the Pleader.

The Court made the following

Order :—Mr. K. Venkata Rao, 1st grade pleader in the District Court of Bellary has been called upon to show cause why he should not be dealt with under S. 13 (*b*) and (*f*) of the Legal Practitioners Act for having advised one Hulkiyal Hanumappa who had applied to be appointed guardian of his minor daughter called Nilavva *alias* Thimmava, to enter into an agreement with two persons, namely, Hanumantha Reddi and Sunkunna to the effect that in return for their services in standing as sureties they should receive a certain portion of the minor's income, namely, one-half of the interest accruing on all Government bonds and Rangoon Debenture loans Rs. 16,000, the property of the minor, during her minority, knowing

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* Ref. Case No. 8 of 1919. 7th October 1919.

[1] (1900) 1 Ir. Rep. 292

[2] (1878) I. L. R 1 A. 751.

In the matter of a First Greade Fleader.

that such arrangement was highly detrimental to the interests of the said minor and that he further presented the security bond drawn up in accordance with the above-mentioned agreement to the District Court of Bellary and obtained therefor the said Court's sanction.

The facts shortly are these : The minor, a Hindu widow, inherited considerable property consisting of moveables and immoveables, the moveable property mainly consisting of 3½ per cent Government securities and Rangoon Debentures of the nominal value of Rs. 16,000. Hanumappa the father and natural guardian applied to be appointed by the Court. He apparently was a poor man and was unable to find the required sureties to the extent of Rs. 32,500 as demanded by the District Judge. He consulted Mr. Venkata Rao who was well known to him and he advised him to apply to the two persons, namely, Hanumantha Reddi and Sunkunna through a common friend of both. They agreed to become sureties on the guardian entering into the agreement mentioned in the charge. The result of the arrangement was that half the income derived from the property of the minor would go to the sureties for four years amounting to about Rs. 1,200.

The question is in the first place whether such an agreement is illegal or detrimental to the interests of the minor, and in the second place, whether Mr. Venkata Rao acted properly in the matter in not advising Hulkiyal Hanumappa not to enter into such an agreement, or whether he believed, as he himself asserts, that the arrangement was to the advantage of the minor. He says that the father of the minor would not have been able to find proper sureties unless he agreed to the terms in question, and the only alternative open to the Court would then have been to appoint a guardian on a salary. That he says would have caused greater loss to the minor's estate than the arrangement in question. On the question whether a guardian is justified in entering into an arrangement by which the sureties are paid a certain portion of the income from the minor's property in consideration of executing a bond, we have been referred to a ruling of the Irish Court on the subject in *Re Lucas* : *Pan* v. *Blair* [1] to the following effect : "Where a person who is entitled as of right to a grant of administration, but is otherwise unable to give justifying security, procures a surety bond from an insurance company, and pays a premium thereon, it is within the discretion of the court to allow the amount of such premium out of the general personal estate, where the circumstances of the case show that reliable security could not otherwise be obtained and that the course adopted was reasonable and proper and for the interest of all parties entitled to the assets." The learned Vice-Chancellor says in the course of the judgment: "Private individuals hate suretyship as a rule; but insurance companies of undoubted solvency can generally be found to guarantee against such losses, for a sum not by any means exorbitant. In cases, where reliable security cannot otherwise be procured, I consider it to be for the interest of all parties entitled to the assets, whether as creditors or beneficiaries that the security of an insurance company, or some equally solvent surety, should be procured at the expense of the estate." He allowed the amount which was agreed to be paid to the insurance company to be paid out of the estate. He says, "of course, when the administrator comes to be allowed this credit, he must satisfy the court that it was a proper and reasonable thing for him to have done; and if it should appear to have been done unnecessarily or improperly, it should be disallowed." There is no Indian ruling on this point excepting a case, *Fateh Singh* v. *Sanwal Singh* [1], But there the man who stood surety for a person charged with a crime did so on receiving from the accused the amount for which he became surety and the court held that that was illegal inasmuch as an arrangement like this would defeat the purposes for which the law requires bonds in such cases. But that is very different from the case here and the principle laid down in the Irish case seems to have a closer bearing on the facts of the present case. Besides we are informed that it is not by any means unusual for a person required to give security to obtain the services of sureties under an agreement to give therein some compensation for the risk. It may be that in certain circumstances, such as in the case in *Fateh Singh* v. *Sanwal Singh* [1] an agreement of this character could be invalid and illegal. But it does not follow that it would not be valid in any case. Whether particular agreement

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[1] (1900) 1 Ir. Rep. 292.

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[1] (1878) I. L. R. 1 A. 751.

In the matter of a First Grade Pleader.

in this case was injurious to the interests of the minor or not, is not very clear upon the facts as we have them on the record. At any rate those facts would not justify us in saying that the agreement under which the guardian consented to part with a portion of the income of the minor's property in consideration of those two sureties consenting to act in the matter must have been detrimental to the interests of the minor. Further we are not in a position to hold that it is made out that Mr. K. Venkata Rao might not have honestly believed that the agreement which the guardian entered into was not a proper one. We have the fact that although the agreement was not brought to the notice of the Court, it was attested by a number of persons of respectable position in life, and there is nothing to show that any attempt was made to keep it a secret arrangement with the consciousness that it was not a proper agreement. We think it would have been better if Mr. Venkata Rao had advised his client to bring the matter to the notice of the Court but in the absence of any evidence to show that he must have thought that the agreement was detrimental to the interests of the minor, we are unable to say that in not advising the guardian to bring the matter to the notice of the Court he was guilty of professional misconduct or was guilty of conduct which would bring him within the purview of clause (*f*) of S. 13 of the Legal Practitioners Act.

The learned Advocate-General who placed the whole matter very fairly before us, drew our attention to that portion of the agreement (Karar) Exhibit B, by which the sureties are given the power to sell and dispose of the securities and to invest the sale-proceeds in other securities and to appropriate any additional income that might have derived from such an investment and suggested that that might amount to a technical breach of trust on the part of the guardian and therefore it was also the duty of Mr. K. Venkata Rao to have advised him accordingly. But this matter is not specified in the charge and we do not therefore propose to deal with it.

In the above view of the facts it is unnecessary for us to consider the scope of clause (*f*) of S. 13 of the Legal Practitioner's Act, or the rulings in cases cited before us on the subject.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE MOORE.

Seshagiri Rao and others ... *Appellants* Petitioners 1 to 4 5, 6, 7, 8 and 9.*

v.

Sreenivasa Rao and others ... *Respondents (Respondents 1 to 9, 11, 12, 13, and 15.)*

Seshagiri Rao *v.* Sreenivasa Rao.

Limitation Act, Art. S. 166, 181—Application by exonerated defendant to set side sale in execution of his properties—Application governed by Art. 181 *and not by art.,* 166.

An application by a defendant who is exonerated by the decree, from liability to set aside a sale in execution of his properties by the plaintiff is governed by Art. 181 and not by Art. 166 of the Limitation Act.

Muthia Chettiar v. *Bava Sahib,* [1] distinguished.

Appeal against Appellate Order of the District Court of Chinglepet in A. S. No. 303 of 1917 preferred against the order of the Court of the District Munsif of Conjeeveram in C. M. P. No. 106 of 1916 in O. S. No. 19 of 1904.

C. V. Anantakrishna Iyer and *C. Sitaramiah* for Appellants.

S. Rangachariar and *S. Vaithinatha Iyer,* for Respondent.

The Court delivered the following

Judgment :—There is no dispute as to the facts in this case. A suit for maintenance was brought by one Yamuna Bayee. Some of the present appellants were defendants 9 to 12 in the suit and were added as supplemental defendants as they belonged to a divided branch of the family. Yamuna Bayee obtained a decree for maintenance against defendants 1 to 8 and the maintenance awarded was made a charge on the shares of defendants 1 to 8 in certain properties. The appellants and their three-fourths share of the properties were expressly exonerated under the decree. In 1906 the decree-holder applied for execution of the decree against defendants 1 to 8 only and no notice of the execution proceedings was taken out to the appellants 1 to 4. Certain lands were attached as belonging to the first defendant in the suit and on 26th January 1910

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*A. A. A. O. No. 76 of 1918. 19th August 1919.

[1] (1914) 27 M. L. J 605.

3 acres 84 cents of land in Shrotriem Thenambakkam village including the three-fourths share of the appellants were sold in court auction and purchased by one Murugesam Chetty the present 9th respondent. The sale was confirmed on the 16th July 1910 and a sale certificate issued to the auction-purchaser on the 18th November 1910, delivery of the properties being given on the 16th December 1910. On 25th July 1911 (a year and seven months after the sale) the appellants filed a suit, O.S. No. 378 of 1911 in the Conjeeveram District Munsif's Court to set aside the auction sale and for partition and recovery of their three-fourths share alleging that the sale was invalid so far as their share of their properties was concerned. The District Munsif dismissed the suit on the ground that as the plaintiffs were parties to the suit in execution of which the sale was held, it was barred by S. 47 of the Code of Civil Procedure. The District Munsif's decision was affirmed on appeal by the District Judge. In S. A. No. 356 of 1914 the High Court remanded the suit to the court of first instance for disposal as a proceeding under S. 47 of the Code of Civil Procedure, the question whether the application was barred by limitation being left open. The lower Courts have dismissed the application as barred by article 166 of the Limitation Act. Hence the present appeal. Mr. Ananthakrishna Aiyar for the appellants contends that the lower court erred in applying art. 166 of the Limitation Act, and that the article applicable is article 181 which provides a period of three years from the time when the right to apply accrues in the case of the application to which no period of limitation is provided elsewhere in the Schedule or by S. 48 of the Code of Civil Procedure. In our opinion the application is governed by article 181 and not by article 166 of the Limitation Act and is consequently not barred by limitation as it was made within the period prescribed by article 181. The appellants were parties to the suit (see the explanation to S. 47 of the Code of Civil Procedure) but were not parties to the decree under which they were exonerated, no notice of the application for attachment and sale of the properties was admittedly given to them and they were strangers to the execution proceedings.

It is not disputed that under the terms of the decree the court has no power to sell the appellant's three-fourths share in the properties. The sale was void for want of jurisdiction (vide *Raghunath Das* v. *Sundar Das Khetri* [1], *Shyam Mandal* v. *Satinath Bannerjee* [2] and *Shinbai* v. *Yesoo* [3]. If an execution sale is a nullity (*i. e.*, is made without jurisdiction or is void *ab initio*, article 166 has in our view no application and the residuary article 181 should be applied. We are justified in our conclusion by the decision in Second Appeal No. 389 of 1914. In that case the facts were that the plaintiff had taken a mortgage from a member of the judgment-debtor's family and had obtained a decree for sale of the one-sixth share of the joint family properties to which his mortgagor was entitled. Under the decree however a one-fourth instead of one-sixth share was brought to sale and purchased by the plaintiff-decree-holder. The learned Judges (Wallis C. J. and Spencer J.) held that the sale in so far as it purported to sell more than one-sixth share awarded by the decree was made without jurisdiction according to the principle laid down by the Privy Council in *Malkarjun* v, *Narhari* [4]. The learned Vakils for the 9th respondent (the auction-purchaser) vendees relied on the decision in *Muthia Chettiar* v. *Bava Sahib* [5]. In that case the decree directed the sale of items in a particular order. They were however sold in a different order. It was held that an application to set aside the sale on the ground that it took place contrary to the direction in the decree was one under S. 47 of the Code of Civil Procedure and would be governed by article 166. *Muthiah Chettiar* v. *Bana Sahib* [5] is however clearly distinguishable as it was the judgment-debtor who moved the Court to have the sale set aside. The facts of the present case are certainly different. The appeal is accordingly allowed with costs payable by the 9th respondent.

The District Munsif is directed to restore the appellant's application to set aside the sale to his file and dispose of it according to law.

C. A. S.

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[1] (1914) I.L.R. 42 Cal. 72 at p. 83.
[2] (1916) I. L. R. 44 Cal. 954 at p. 962.
[3] (1918) I. L. R. 43 Bom. 235.
[4] (1900) I. L. R. 25 Bom. 337.
[5] (1914) 27 M L. J. 605.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BAKEWELL AND MR. JUSTICE MOORE.

Ramanathan Pillai ... *Appellant* * *(Plaintiff.)*

v.

M. Doraiswami Ayyangar and others ... *Respondents (Defendants Nos. 1 to 4 and 6 to 10).*

Ramanathan Pillai *v.* Doraiswami Ayyangar.

Civil Procedure Code, S. 145—Third party furnishing security on behalf of the judgment-debtor, whether a party to suit—Suit by surety to cancel the security bond on the ground of fraud—Whether maintainable—Scope and effect of S. 145.

A third party who has given security on behalf of a judgment-debtor for the due performance of a decree has not an independent right of application under S. 47 of the Code of Civil Procedure and cannot therefore apply to the executing court to cancel the security bond on the ground that it was obtained by fraud. His remedy is only by way of suit.

The effect of S. 145 of the Code of Civil Procedure is that the surety may be made a party to the execution proceedings against the principal debtor and an order against the surety is in effect a decree upon his separate contract against him for the payment of money.

The surety is not a party to the suit or to the decree made therein nor does he become a party to the execution proceedings until application is made for an order against him. S. 145 only makes him a party for a limited purpose namely, for appeal.

Second Appeal against the decree of the District Court of Madura in Appeal Suit No. 121 of 1917, preferred against the decree of the Court of the Temporary Subordinate Judge of Madura in Original Suit No. 6 of 1916 (Original Suit No. 19 of 1915 on the file of the Court of the Subordinate Judge of Madura).

B. Sitarama Rao and *S. R. Muthuswami Aiyar,* for Appellants.

V. V. Srinivasa Aiyangar, for Respondent.

The Court delivered the following

Judgment :—In execution of the decree in C. S. 34 of 1912 in the High Court, one Sayyed Mahomed Rowther was arrested. On 29th September 1914 the judgment-debtor and the present appellant as surety on behalf of the judgment-debtor executed a security bond for Rs. 4,443-2-0 in favour of the District Court of Ramnad in which Court the execution proceedings were pending, and the judgment-debtor was released. The bond provides for the payment of the amount either jointly or severally by the executants. There is also a further provision that in case of default in payment, the money should be recovered from the surety personally, and from the properties hypothecated under the security bond and from the other properties of the surety. The properties hypothecated are, it appears, situate in the Madura District. On the 8th February 1915 the appellant filed a suit (Original Suit No. 19 of 1915) in the Subordinate Judge's Court of Madura against the plaintiffs in C.S. No.34 of 1912 and their judgment-debtor for a declaration that the security bond, had been fraudulently obtained by the defendants and was void and not binding on the appellants' properties and for cancellation of the security bond. It was alleged in the plaint that the appellant was a person of weak intellect and that the bond has been executed owing to undue influence, fraud and coercion practised upon him by certain persons acting in collusion with the defendants. A preliminary objection was taken by defendants (respondents) that the suit was barred by S. 47, Code of Civil Procedure. The Temporary Subordinate Judge held that the appellant had alternative remedies, (1) in execution proceedings in the Ramnad District Court and (2) by way of suit. He further decided that, as the appellant had a remedy in execution proceedings the Court should not in the exercise of its discretion grant the declaratory relief sought for and in the result, dismissed the suit. In appeal the District Judge took the same view and held "that as the party had a remedy in execution and also an appeal," the declaratory relief asked for was rightly refused.

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* S. A. No. 1061 of 1918. 2nd September, 1919.

Mr. Sitarama Rao for the appellant contended (1) that the lower Appellate Court ought to have held that no relief such as is claimed in the plaint could be granted in execution, (2) that the suit being for the substantial relief of cancellation of the document on the ground of undue influence and fraud which the executing court could not grant, the lower Appellate Court erred in holding that it had a discretion in relief, and that in any view of the case the discretion had been improperly and and illegally exercised.

The question raised in this appeal, *viz.*, whether a third party who has given security on behalf of a judgment-debtor for the due performance of a decree has an independent right of application under S. 47 of the Code of Civil Procedure and can apply to the executing Court to cancel the security-bond on the ground that it was obtained by fraud or whether his only remedy is by way of suit is a novel one and not free from difficulty. No decision directly bearing on the question has been cited before us. S 145 of the Code of Civil Procedure, which corresponds to S. 253 of the Code of 1882, is in these terms: "Where any person has become liable as surety (a) for the performance of any decree or any part thereof, or (b) for the restitution of any property taken in execution of a decree or (c) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the Court in any suit or any proceeding consequent thereon, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person, shall, for the purposes of appeal, be deemed a party within the meaning of S. 47. Provided that such notice as the Court in each case thinks sufficient has been given to the surety." The section provides a summary remedy in execution and dispenses with the necessity for a separate suit to the extent to which the surety has rendered himself *personally* liable. *Motilal Virchand* v. *Thakore Chandrasangji*, [1] and *Amir* v. *Mahadeo Prasad* [2], which were relied on by the learned Vakil for the appellant have no direct bearing on the question which we have to decide. In the 36 Bombay case it was held that where a bond is passed by third parties as security for restitution in the event of the decree being reversed in appeal the obligee may file a suit upon the contract contained in the bond. In *Amir* v. *Mahadeo Prasad* [2], the learned Judges held that, if the surety takes upon himslf more than the personal liability, and hypothecates immoveable property such hypothecation can only be enforced against the property by means of a regular suit.

The learned Vakil for the respondents has referred us to the decision in *Subramaniam Chettiar* v. *Raja of Ramnad* [3]. In that case the question was that whether when immoveable property has been given by the judgment-debtor as security for the due performance of a decree pursuant to an order made under O. XLI R. 5 (3) of the Code of Civil Procedure that property can be realised by a decree-holder in execution or can only be realised by a separate suit. The learned Judges (Wallis, C. J., and Kumarsawami Sastri, J.,) were of opinion that the matter being one relating to execution under S. 47 of the Code of Civil Procedure a separate suit did not lie, and that the fact that the bond was given to the Court did not make it a question arising between the judgment-debtor and a third party so as to take it out of the section. At page 333 of the report the learned Chief Justice observed that it was unnecessary to deal with cases of security given by third parties under S. 145 of the Code of Civil Procedure.

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[1] (1911) I. L. R. 36 Bom. 42 [2] (1916) I. L. R. 39 All. 225.
[3] (1917) I. L. R. 41 Mad. 327=34 M. L. J. 84.

The point for decision in this appeal is whether the surety can be regarded as a party to the suit, so as to entitle him to present an application to the Court executing the decree. In *Linga Reddy* v. *Hussain Reddy* [1], it was held on the authority of *Thirumalai* v. *Ramayar* [2], *Sheik Suleman* v. *Shivram Bhikaji* [3] and other cases with reference to S. 253 of the Code of 1882 that the surety should be treated as a party to the suit, and cannot bring a suit for a declaration that he is not liable under the surety bond. S. 145 of the Code of Civil Procedure differs in some respects from the old section. S. 145 says that the surety shall " for the purposes of appeal be deemed to be a party within the meaning of S. 47." We think that the words " shall for the purposes of appeal be deemed to be a party" which were apparently introduced in order to give effect to certain rulings under the old Code. *Sheik Suleman* v. *Shivram Bhikaji* [3] and *Akhoot Ramanab* v. *Ahmed Eusoofjee* [4]) only mean that if an order is made in execution against a surety, the surety may appeal against the order as if he were a party to the suit in which the decree or order sought to be executed was passed, and that the reference to S. 47 does not in other respect import into S. 145 the provision contained in S. 47 which bars a separate suit. If it were not for the provisions of S. 145 the liability of the surety would have to be enforced by a separate suit, because it does not arise under the decree but subsequently and under a separate contract with the Court. The effect of the section is that the surety may be made a party to the execution proceedings against the principal debtor, and an order against the surety is in effect a decree upon his separate contract against him for the payment of money. The surety is not a party to the suit or to the decree made therein, nor does he become a party to execution proceedings until application is made for an order against him. He is not a party to the suit within S. 47 and S. 145 only makes him a party for a limited purpose, namely, for appeal.

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[1] (1904) I. L. R. 28 Mad. 117.

[2] (1889) I. L. R. 13 Mad. 1.

[3] (1887) I. L. R. 12 Bom 71.

[4] (1871) 15 W. R. 538

It is doubtful whether the question in this case relates to the execution, discharge or satisfaction of the decree, since it relates to the surety bond and not to the decree, and to the enforcement of the liability incurred thereunder and not under the decree. We doubt whether the surety, if he be not made a party to execution proceedings can intervene in a matter in which he has no interest.

We are unable therefore to agree with the conclusion arrived at by the lower courts that the surety has a right to apply under S. 47 to have the security bond cancelled.

The lower courts have refused the declaratory relief sought for on the ground that it was a discretionary relief and as the appellant had a separate remedy by way of suit. We think that the lower courts were wrong, and that the suit should have been tried on the merits. We accordingly allow the appeal with costs in this Court and reverse the decrees of the lower courts. The Temporary Subordinate Judge is directed to restore the suit to his file and dispose of it according to law. Costs in the lower courts will abide the result. The appellnat is entitled to a refund of the Court fee of the Second Appeal.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE MOORE.

Ponnuswami Chetty and another ... *Appellants** (*Defts. 2 & 3.*)

v.

The Vellore Commercial Bank Ltd.... *Respondent* (*Plaintiff*) by Agent Kumaraswami Aiyar

Ponnuswami Chetty v. The Vellore Commercial Bank Ltd.

Limitation Act, Arts, 69, 73, 80—*Applicability—On demand promissory note—Contemporaneous agreement postponing date of payment—Suit on note—Limitation—Starting point—Admissibility of agreement in evidence—Effect.*

In a suit upon a promissory note executed by the defendant in favour of the plaintiff bank, it appeared that it was customary for the Bank to fix a period for payment and that the defendant's application for the loan was in a printed form in which he added the words " for six months Thavanai" and on which the officer of the Bank concerned made an endorsement to the effect that the amount might be lent to defendant " for six months Thavanai."

Held, that the application form, with the endorsement thereon, formed part of the same transaction as the suit note and was receivable in evidence for fixing the date of payment of the amount of the note and that the suit on the note was governed by art. 69 or 80 of the Limitation Act, the starting point of limitation being six months after the date of the note.

Quære whether art. 73 was applicable to the case.

Appeal against the order of the Court of the Temporary Subordinate Judge of Vellore dated 11th October 1918 in Appeal No. 130 of 1918, preferred against the decree of the Court of the District Munsiff of Vellore in O. S. No. 587 of 1916.

A. Visvanatha Aiyar, for the Appellants.

N. Chandrasekhara Aiyar, for the Respondent.

The Court delivered the following.

Judgment :—The suit was brought upon a promissory note, Exhibit A. The question is when the cause of action arose for the suit. The defendant applied to the Bank at Vellore by Exhibit B for a loan. The application is in a printed form and he filled up the blank by inserting the words 'for six months Thavanai. Thereupon the application was referred to an officer of the Bank, who made an endorsement to this effect. "The applicants are responsible men. I am of opinion that Rs. 3000 may be lent to them for six months Thavanai at 12 annas per cent per mensem. On the same date the promissory note was executed. In the accounts of the Bank Exhibit C, six months interest was deducted from the money paid to the defendant. On these facts the question is whether the cause of action arose on the date of the note or whether it arose only after the six months provided for in the application from Exhibit B. Mr. Viswanatha Aiyar referred us to one circumstance which may be disposed of at once. He referred to rule 24 of the rules of the Bank which provided for the Bank anticipating the due date and suing before the six months are over. That was a provison made in the interests of the Bank and certainly has no effect upon the date upon which the cause of action starts. That provision was doubtless made to enable the Bank to bring a suit if it found that the defendant had become an insolvent or was likely to leave the jurisdiction of the Court. In our opinion that provision could not in the least affect the starting period of limitation.

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* A. A. O. No. 52 of 1919. 18th September, 1919.

The learned Vakil for the appellant argued that the exception provided for in Article 73 can have no application to this case. There is something to be said for this argument, because the article speaks of an agreement in writing restraining or postponing the right to sue. It is doubtful whether Exhibit B really restrains or postpones the right to sue. The proper mode of looking at Exhibit B is to regard it as forming part of the same transaction as Exhibit A and as fixing the period of payment six months after the date on which the document was executed. The first question is whether this document is receivable in evidence. If we understand Mr. Visvanatha Aiyar's argument rightly, he seemed to suggest that if Exhibits A and B are read together, the stamp duty will be payable as on a promissory note payable six months after date. But we regard Exhibit A as containing a promise to pay and Exhibit B which is contemporaneous with Exhibit A as fixing the time for payment. That such a document is receivable in evidence is clear from the judgment of Lord Dunedin in *Mota Bhoy Mulla Essabhoy* v. *Mulji Haridas* [1]. In that case there was a promissory note for Rs. 50,000, and there was also a contemporaneous oral agreement that the document should not be sued on but that another document should be given for the amount. The suit was brought on the promissory note. The Judicial Committee differing from the Courts below held that this agreement which had the effect of substituting a new contract for the promissory note, could be pleaded in defence and was receivable in evidence. The principle of the decision is applicable to the present case. It is open to defendants to plead that notwithstanding the language of Exhibit A, it was agreed between the parties that the cause of action for the money was not to commence until after six months of the date of the note ; further *Cumming* v. *Shand* [1] points out that the custom of the trade can be read into a promissory note or Bill of Exchange, executed by a customer to the Bank. Here the printed form makes it clear that it is customary for the Bank to fix a period for payment. Therefore the promissory note must be taken to have been given subject to that proviso. To the same effect the ruling in *Brown* v. *North* [2]. For these reasons we are of opinion that the document Exhibit B, with the endorsement thereon, is receivable in evidence.

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[1] (1915) 42 I. A. 103=39 Bom. 399=28 M. L. J. 589.

If they are receivable in evidence the next question is under what article of the Limitation Act does the present suit fall. As we said at the outset, it may be open to argument whether article 73 in terms is applicable. But we fail to see why article 69 or article 80 should not apply to this case. Article 69 provides for a suit upon a Bill of Exchange or money payable at a fixed time ; and the 3rd column is " when the bill or note falls due ". It was contended for the appellant that unless the promissory note itself in terms embodies this stipulation as to the period of payment, this article is not applicable. We are unable to agree with this contention. If evidence is receivable to fix the date of payment, then that would explain the contract which has been entered into and would have the effect of supplementing the contract on a matter on which it is silent and which is not in contest with the terms of the note. Similarly as regards Article 80 ; it is a general article which refers to all suits and promissory notes ; and the 3rd column makes time commence when the bill or note or bond becomes payable. On our veiw that Exhibit B is receivable in evidence that document makes the promissory note payable six months after the date of the execution of Exhibit A. For these reasons we are of opinion that the Subordinate Judge is right in holding that the cause of action arose six months after

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1. (1860) 5 H and N 95.

2. L. R. 8 Ex. p. 1 at 10 and 16.

the execution of Exhibit A and not immediately after. We are supported in our view by the decision of a Full Bench in *Annamalai Chetty* v. *Velayuda Nadar* [1] although this exact point was not decided in it.

We dismiss the appeal with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE MOORE.

K. C. Srimanavedan Raja ... (*Petitioner* Party I 2nd respondent.*)

v.

Parapravan Moidu ... (*Respondent Party II*)

Srimanavedan Raja *v.* Parapravan Moidu.

Cr. P. C. S. 145—Possession Proceedings—Magistrate—Refusal to take oral evidence—Legality—Revision—Interference in—High Court — Jurisdiction—Documents showing title—Admissibility—Evidentiary value.

In possession proceedings relating to a tract of forest land, the Magistrate inspected the locality, and, being of opinion that the inspection completely satisfied him as to the point in issue, viz., the fact of actual possession of the disputed property, declined to take oral evidence and passed an order after discussing the documentary evidence (showing title to the property) filed in the case. *Held*, that the Magistrate acted without jurisdiction in refusing to take evidence and that the High Court had jurisdiction to set aside his order.

Documents showing title to the property in question should only be utilised for the purpose of elucidating the oral evidence that may be admitted in the case and should not, by themselves, be used for concluding the question as to possession.

Petitions under Sections 435 and 439 of the Code of Criminal Procedure, 1898, and Section 107 of the Government of India Act, 1915 praying the High Court to revise the order dated 20th September 1919 of the Court of the Joint Magistrate, Tellicherry Division in M. C. No. 57 of 1919.

Nugent Grant and *K. S. Krishnaswami Aiyangar*, for Petitioner.

The Public Prosecutor for Government and *C. V. Anantha Krishna Aiyar*, for Respondent.

The Court made the following

Order :—This is an application to revise an order passed by the Sub-Divisional Magistrate of Tellicherry under S. 145, Criminal Procedure Code. The rival Jenmies were disputing the right to possession in respect of a tract of forest land 30 square miles in extent. In February 1919, the Inspector of Police reported to the Magistrate that there was a likelihood of a breach of the peace in respect of the possession of this property. Thereupon he initiated proceedings under S. 145, Criminal Procedure Code. Meanwhile a suit was instituted in the Munsif's Court in respect of the very same property. An injunction was issued by the District Munsif. In consequence of the issue of this injunction the Magistrate stayed his hands for some time. Subsequently this injunction was dissolved by the District Judge in August 1919. The Magistrate revived the proceedings under Section 145, Criminal Procedure Code. We are told that there was a fresh report from the Police Inspector informing the Magistrate that there was a likelihood of a breach of the peace. After passing a preliminary order, the Magistrate proceeded to the disputed locality and inspected it. According to the affidavit filed in this court, the inspection seems to have been a hurried one; the affidavit says that the Magistrate remained in the locality for about two hours and travelled over about 11 miles of it. On the strength of this inspection the Magistrate in paragraph 2 of his judgment says: "That inspection completely satisfied me as to the point in issue *viz.*, the fact of actual possession of the disputed property. I find that nothing is to be gained by calling on the parties to produce further evidence--the value of which (whether oral or documentary) in a dispute of this kind is very doubtful." Then he discusses the documentary evidence which was filed in the case and says in paragraph 6: "Then, very strangely, the Idam demised the very same land on otti to Kalliat Chathu Kutti Nambiar on 11-6-1918." Now if the learned Magistrate had taken evidence, the petitioner might have been able to show that there was nothing strange in this second lease to Chathu Kutti Nambiar. Mr. Grant who appeared for K. C. Manadevan Raja informed us that his client transferred his lease to this Nambiar because he was unable to pay the lease amount. Subsequently the Nambiar surrendered the lease to the Idam. The Idam re-granted the lease to Manadevan Raja. He subsequently transferred his newly acquired right to a company known "the Malabar Trading Company, "but is working as its agent. It was because the Magistrate refused to

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* Cr. Rev. Case No. 631 of 1919.

Cr. Rev. Petition No. 541 of 1919. 12th November 1919

[1] (1915) I. L. R. 39 Mad. 129 (F. B.)

Srimanavedan Raja v. Paraprayan Moidu.

take evidence that he found himself in the strange position he described. Then, in another place in paragraph 6 of his judgment, the Magistrate says, "The Idam must have regarded the lease to him as void thereafter." We are unable to understand where he gets the idea from that the lease became void. This again is the result of his shutting out the oral evidence in the case. Under these circumstances, the question for our decision is whether we have jurisdiction to revise the order of the Magistrate. The learned counsel for the petitioner has quoted a large number of authorities to show that the refusal to take evidence will amount to a declining of jurisdiction. One of the earliest cases in this Presidency was decided by Mr. Justice Wallis as he then was, and is reported in *Arumuga Goundan* v. *Venkatasubbier* [1]. There the learned Judge points out that where a Magistrate did not take evidence himself but acted on the evidence taken by somebody whom he deputed for the purpose, the Magistrate acted without jurisdiction and the High Court had power to interfere. That decision was followed in *Velayuda Kone* v. *Narayana Kone* [2]. In Calcutta the view has been consistently held that where there has been a refusal by a Magistrate to examine witnesses that would be tantamount to a refusal to exercise jurisdiction. The Magistrate in this case based his conclusion on documents showing title to the property. As was pointed out by Miller, J., in *Panaganti Parthasarathy Nayanim Garu* v. *Pallikapu Venkatasami Reddi* [3], documentary evidence of this description should only be utilised for the purpose of elucidating oral evidence that may be admitted in the case. By themselves the documents should not be used for concluding the question as to possession. We are therefore of opinion that the procedure adopted by the Magistrate in declining to receive oral evidence is a matter which can be revised by the High Court, This view is not inconsistent with the decision in *Kamakutti* v. *Udayavarma Raja Valia Raja of Chirakkal* [4].

The Magistrate refers often to the local inspection which he made. As was pointed out in *Sahadat Khan* v. *Taljaddi Sheikh* [5], a decision as to possession based solely upon local inspection is not what Section 145, Criminal Procedure Code contemplates. The Judicial Committee in *Kessowji Issur* v. *G. I. P. Railway Company* [1], held that where a civil suit was decided not on testimony given at the trial as to what took place on the night of the accident, but by the Judge's observation of what they saw on another night altogether, the decision based on it must be set aside. For these reasons we are of opinion that the procedure adopted by the Magistrate was irregular and that he acted without jurisdiction in refusing to take evidence: his order should be set aside. With the setting aside of the order, the order passed by the learned Judge of this court attaching the timber must necessarily go because it is for the Magistrate to say whether there is such an emergency as would justify him in acting under Section 145, cl. 4 Criminal Procedure Code. This case is not covered by S. 146. Criminal Procedure Code. *Reid* v. *Richardson* [2], to which the learned counsel for the petitioner drew our attention was a case in which the lower court having found that neither party was in possession refused to make an order as to the attachment of the property. When the matter came up before the High Court, it was held that it had the same powers as the original court had under S. 146, Criminal Procedure Code, to direct the attachment of the property. We hold that the order as to attachment dated 10th October 1919 and made in Criminal Miscellaneous Petition No. 519 of 1919 on the file of this Court, must be vacated as a result of our setting aside the proceedings under S. 145, Criminal Procedure Code.

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[1] (1907) I. L. R. 31 Mad. 82

[2] (1915) 2 L. W. 1208.

[3] (1910) I. L. R. 34 Mad. 138.

[4] (1912) I.L.R. 36 Mad. 275.

[5] (1919) 23 C. W. N. 750.

The only question is whether this case should go back to Mr. Thorne. We do not wish to cast the slightest doubt upon his impartiality or upon his capacity to dispose of this case. But having regard to the statement which he has made more than once that any oral evidence that might be let in will not influence his mind, we would not be justified in sending the case back to him. In these circumstances we think it desirable that the case would be sent to the District Magistrate with directions either that he should dispose of the case himself or send it for disposal to any other First Class Magistrate.

A. S. V.

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[1] (1907) I. L. R. 31 Bom. 381. (P. C.)

[2] (1887) I. L. R. 14 Cal. 861

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE SPENCER AND MR. JUSTICE BAKEWELL.

Chodavarapu Narayana Row and others ... *Appellants* * (*Defendants.*)

v.

Chennuru Venkatasubba Row ... *Respondent.* (*Plaintiff.*)

Minor—Contract by guardian for purchase of land—Enforceability of by minor, on attaining majority—Transfer of Property Act, S: 55 (1) (d).

It is not within the competence of a guardian of a minor to bind the minor or his estate by a contract for the purchase of immoveable property. The minor in such a case is not bound by the contract and there is no mutuality. Consequently it is not open to the minor, on attaining majority, to enforce specific performance of the contract. *Mir Sarwarjan* v. *Fakhruddin Mahomed Chaudhuri* [1] followed.

Raghavachariar v. *Srinivasa Raghavachariar* [2], *Ramjogayya* v. *Jaganatham* [3] Referred to.

Krishna Iyer v. *Shamanna* [4] not followed

Narayana Row *v.* Venkatasubba Row.

Spencer, J.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Masulipatam in A. S. No. 217 of 1917 (A. S. No. 234 of 1917, District Court of Kistna) preferred against the decree of the Court of the District Munsif of Masulipatam in O. S. No. 27 of 1915.

P. Narayanamurthi, for Appellant.

V. Ramadoss, for Respondent.

The Court delivered the following

Spencer, J.

Judgments—*Spencer, J.*—The facts of this case so far as they are necessary for the disposal of this Second Appeal are as follows :—In 1905 the managers of the defendants' undivided family sold certain lands to the testamentary guardians of the plaintiff, who was then a minor, the consideration being the discharge of a certain mortgage debt then due by the defendant's family under a mortgage deed executed in favour of the plaintiff's adoptive father. In accordance with the agreement of sale possession was then given of the property and the plaintiff claims to have held possession ever since. A sale deed was also drawn up but not registered on account of some verbal defects. A suit to enforce registration would now be long out of time if brought under S. 77 of the Indian Registration Act (Act XVI of 1908), This suit was instituted in January 1915 for specific performance, the prayer in the plaint being that the defendants be directed to execute a proper registered sale deed in favour of the plaintiff in respect of the immoveable property mentioned in the schedule and to pay the plaintiff's costs of the suit.

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* S. A. No. 1901 of 1918. 7th August 1919.

[1] (1911) I. L. R. 39 C. 232 (P. C.)

[2] (1916) I. L. R. 40 M. 308 (F. B.)=31 M. L. J. 575.

[3] (1918) I. L. R. 42 M. 185=36 M. L. J. 29.

[4] (1912) 23 M. L. J. 610.

Before the institution of this suit the plaintiff attained his majority. The defence to the suit *inter alia* were that specific performance could not be enforced against the defendants for want of mutuality and that the suit was time-barred. The District Munsif found for the defendants on these two points and dismissed the suit. On appeal the Temporary Subordinate Judge reversed the District Munsif's decision and entered judgment for the plaintiff.

On the first point I think that the Privy Council decision in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* [1] is applicable to the facts of this case and decisive. Their Lordships observed, at page 237, that it was not within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property and they were further of opinion that as the minor in that case was not bound by the contract, there was no mutuality, and that the minor who had at the time of the suit reached his majority could not obtain specific performance.

S. 23 of the Specific Relief Act (I of 1877) declares who may obtain specific performance of a contract and includes in the list any party to the contract and the representative in interest or the principal of any party thereto. The plaintiff in this case was not a party to the contract for purchase nor is he the representative in interest of his guardians, nor can they be strictly called his agents because agency implies contracting power in the principal, and the plaintiff, being a minor was incompetent to contract at the time of the contract being made by his guardians.

An attempt has been made in this Court to distinguish *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* [1], on the grounds (1) that the guardian in that case was the *de facto* guardian of a Mahomedan and (2) that the performance that is sought to be enforced in the present case is the performance of a statutory duty under S. 55 (d) of the Transfer of Property Act (IV of 1882) rather than the terms of any particular contract. The answer to this is that the want of mutuality between the parties to the suit and not any want of validity in the guardian's appointment was the ground of Lord Macnaugten's decision, and secondly, although certain liabilities are imposed by statute upon buyers and sellers, these are obligations that flow from the contractual relations between the parties and do not exist independently of their contract. These provisions are intended by the legislature to be terms implied in every contract of this description unless there is anything stated to the contrary. The case of *Mir Sarwarjun* v. *Fakhruddin Mohomed Chowdhury* [1] has been considered in a decision of this Court in *Krishna Iyer* v. *Shamanna* [2]. With due respect, 1 confess I am unable to follow the reasoning of the learned Judges who decided that case. I do not consider that any analogy can be drawn between a contract made by the guardian of a minor and one made by the manager of a joint family who has the power in case of family necessity to convey away the interests of himself and other members of the family. A contract made by the manager of a joint family may be specifically enforced against him and he may be compelled to exercise his power of conveyance without the other members of the family being parties to the contract or to the conveyance. A completed contract in a minor's favour stands on a different footing.A minor may enforce a sale or a mortgage executed in his favour. (*See Hari Mohun Mondal* v. *Mohini Mohan Bannerji* [3] and *Ragavachariar* v. *Srinivasa Ragavachariar* [4]) although as pointed out by the learned Chief Justice the minor may not be entitled to sue the mortgagor on the personal covenant to pay. That a minor's guardian cannot impose a personal liability on his ward by contract was again emphasised in the judgment of the learned Chief Justice in *Ramajogayya* v. *Jagannatham* [5] and there can be no

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[1] (1911) I. L. R. 39 Cal. 232 (P. C.)

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[1] (1911) I. L. R. 39 C. 232

[2] (1912) 23 M. L. J. 610 at page 616.

[3] (1917) 22 Cal. W. N. 130.

[4] (1916) I. L. R. 40 Mad. 308.

[5] (1918) I. L. R. 42 Mad. 185.

Naraayana Row v. Venkatasubba Row

Spencer, J.

doubt that the covenants, the specific enforcement of which is intended in the Specific Relief Act, are all personal. In the present case the Subordinate Judge was undoubtedly wrong in treating the transfer as complete even before the execution of a registered document. He said it was "completed for all practical purposes" by the payment of the price and delivery of possession. The provision in the second paragraph of S. 54 of the Transfer of Property Act (IV of 1882) cannot be so easily avoided. On the above ground alone I think that the present suit must fail and I do not think it necessary to express an opinion on the question of limitation. I have only to observe that S. 55 (d) of the Transfer of Property Act makes it the duty of the buyer to first tender to the seller a proper conveyance for execution at a proper time and place and on the findings of fact which are before us in second appeal, it is impossible to say that this has ever been done. The appeal must be allowed and the decree of the District Munsif restored with costs here and in the Lower Appellate Court.

Bakewell, J.

Bakewell, J.—I agree.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR.

P. Kandaswami Mudaliar ... *Petitioner** (*Accused in C. C. No. 7124 of 1919 on the file of the Court of the Presidency Magistrate, Egmore, Madras*).

In re.

Kandaswami Mudaliar. *In re.*

Madras City Municipal Act (*III of* 1904) *S.* 366 *cl.* (3)—*Penal Code*, S. 269—*Health Officer—Order directing removal of patient to hospital—Disobedience if and when an offence—Prosecution under* S. 269 *I. P. C. for disobedience of order under* S. 366—*Maintainability—Onus of proof on prosecution.*

In a case in which the accused was asked by the Health Officer of the City of Madras to remove his son, who was suffering from small-pox to an Isolation Hospital, he, under the advice of the Medical Practitioner, who was treating his son, removed him to an isolated house. In a revision filed against the conviction and sentence passed on the accused under S. 269 I.P.C., *held*, setting aside the conviction and sentence, that, though the refusal to comply with the direction of the Health Officer might have been illegal, it was not unlawful in as much as proper precautions were taken by the accused to prevent infection and to provide a suitable lodging for the person infected.

In a prosecution under S. 366 cl. (3) of the City Municipal Act, the prosecution is not relieved from proving the elements which constitute the offence under S. 269 I.P.C. The prosecution must make out not only that there has been dis-

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* Cr. Rev. Case. No. 394 of 1919.

Cr. Rev. Petition No. 387 of 1919. 26th September 1919.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER AND MR. JUSTICE BAKEWELL.

Chodavarapu Narayana Row and others ... *Appellants* * (*Defendants.*)
v.
Chennuru Venkatasubba Row ... *Respondent* (*Plaintiff.*)

Minor—Contract by guardian for purchase of land—Enforceability of by minor, on attaining majority—Transfer of Property Act, S 55 (1) (*d*).

It is not within the competence of a guardian of a minor to bind the minor or his estate by a contract for the purchase of immoveable property. The minor in such a case is not bound by the contract and there is no mutuality. Consequently it is not open to the minor, on attaining majority, to enforce specific performance of the contract. *Mir Sarwarjan* v. *Fakhruddin Mahomed Chaudhuri* [1] followed.

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P. Narayanamurti, for Appellant.

V. Ramadoss, for Respondent.

The Court delivered the following

Spencer, J.

Judgments:—*Spencer, J.*—The facts of this case so far as they are necessary for the disposal of this Second Appeal are as follows:—In 1905 the managers of the defendants' undivided family sold certain lands to the testamentary guardians of the plaintiff, who was then a minor, the consideration being the discharge of a certain mortgage debt then due by the defendant's family under a mortgage deed executed in favour of the plaintiff's adoptive father. In accordance with the agreement of sale possession was then given of the property, and the plaintiff claims to have held possession ever since. A sale deed was also drawn up but not registered on account of some verbal defects. A suit to enforce registration would not now be long out of time if brought under S. 77 of the Indian Registration Act (Act XVI of 1908). The suit was instituted in January 1915 for specific performance, the prayer in the plaint being that the defendants be directed to execute a proper registered sale deed in favour of the plaintiff in respect of the immoveable property mentioned in the schedule and to pay the plaintiff's costs of the suit.

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On the first point I think that the Privy Council decision in *Sarwarjan* v. *Fakhruddin Mahomed Chowdhuri* [1] is applicable to the facts of this case and decisive. Their Lordships observed, at page 237, that it was not within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property,and they were further of opinion that as the minor in that case was not bound by the contract, there was no mutuality, and that the minor who had at the time of the suit reached his majority could not obtain specific performance.

S. 23 of the Specific Relief Act (I of 1877) declares who may obtain specific performance of a contract and includes in the list any party to the contract and the representative in interest or the principal of any party thereto. The plaintiff in this case was not a party to the contract for purchase nor is he the representative in interest of his guardians, nor can they be strictly called his agents because agency implies contracting power in the principal, and the plaintiff being a minor was incompetent to contract at the time of the contract made by the guardians.

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Spencer, J.,

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2. (1912) 23 M. L. J. 610 at page 616.
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Narayana Row v Venkata-subba Row.

doubt that the covenants, the specific enforcement of which is intended in the Specific Relief Act, are all personal. In the present case the Subordinate Judge was undoubtedly wrong in treating the transfer as complete even before the execution of a registered document. He said it was "completed for all practical purposes" by the payment of the price and delivery of possession. The provision in the second paragraph of S. 54 of the Transfer of Property Act (IV of 1882) cannot be easily avoided. On the above ground alone I think that the present suit must fail and I do not think it necessary to express that S. 55 (d) of the Transfer of Property Act makes it the duty of the buyer to first tender to the seller a proper conveyance for execution at a proper time and place and on the findings of fact which are before us in second appeal, it is impossible to say that this has ever been done. The appeal must be allowed and the decision of the District Munsif restored with costs here and in the Lower Appellate Court

Bakewell, J.—I agree.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR.

P. Kandaswami Mudaliar ... *Petitioner* * (*Accused in C. C. No. 7124 of 1919 on the file of the Court of the Presidency Magistrate, Egmore, Madras.*

In re.

Kandaswami Mudaliar. *In re.*

Madras City Municipal Act (III of 1904) S. 366 *cl.* (3)—*Penal Code*—S. 269—*Health Officer—Order directing removal of patient to hospital—Disobedience if and when an offence—Prosecution under S.* 269 *I. P C. for disobedince of order under S.* 366—*Maintainability—Onus of proof on prosecution.*

In a case in which the accused was asked by the Health Officer of the City of Madras to remove his son, who was suffering from small-pox to an Isolation Hospital, he, under the advice of the Medical Practitioner, who was treating his son, removed him to an isolated house. In a revision filed against the conviction and sentence passed on the accused under S. 269 I.P.C., *held*, setting aside the conviction and sentence, that, though the refusal to comply with the direction of the Health Officer might have been illegal, it was not unlawful in as much as proper precautions were taken by the accused to prevent infection and to provide a suitable lodging for the person infected.

In a prosecution under S. 366 cl. (3) of the City Municipal Act, the prosecution is not relieved from proving the elements which constitute the offence under S. 269 I P. C. The prosecution must make out not only that there has been disobedience to the order of the Health Officer but also that the disobedience was unlawful and negligent and had also the effect of spreading infectious disease.

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* Cr. Rev. Case. No. 394 of 1919.
Cr. Rev. Petition No. 337 of 1919. 26th September 1919.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the conviction and sentence passed on the petitioner by the Court of the Presidency Magistrate, Egmore, Madras in C. C. No. 7124 of 1919.

K. P. Kesana Menon, for the Petitioner.

The Crown Prosecutor, for the Government.

The Court made the following

Seshagiri Aiyar, J.

Order:—The facts of the case are these. The accused was asked by the Health Officer of the City of Madras to remove his son to the Isolation Hospital at Krishnampet as the child was then suffering from Small-pox. The child was being treated by Dr. V. Rama Kamath, a certified Medical Practitioner. This gentleman advised the accused to remove the patient to an isolated house which was done. Thereupon this prosecution was launched under S. 269 of the I. P. C. The Magistrate was apparently of opinion that as the Health Officer was the sole Judge of the justness of the order to remove the infected child to a hospital, he had no option but to convict the accused of the offence. There is an affidavit that the Magistrate did not permit evidence being given as to the precautions taken by the accused to avoid infection. The question for consideration is whether this conviction is right. Under S. 366 of the Madras Municipality Act (III of 1904) under which the order for removal was made, it must " appear to the Health Officer that a person is suffering from a dangerous disease, has no proper lodging or accommodation or lodged in a place occupied by more than one family." Then he can order the person to be removed to the Isolation Hospital. So the Health Officer has to be satisfied not only that a person is suffering from infectious disease, but also that the infected person has no proper lodging or is lodged in a place which is occupied by more than one family. In this case, no doubt, at the time the order was made, the son of the accused was being lodged in a place which was occupied by more than one family. Therefore the order in its inception was right although it is defective in that it gave no option to the accused to lodge his son in a proper place. The further question is whether the action of the accused in providing a separate lodging in andaswami KMudaliar *In re.*

Seshagiri Aiyar, J.

which there were none living but the patient and himself was such a violation of the order as brought him under S. 269 of the I. P. C. The 3rd clause of S. 366 says : "whoever, having charge of a person in respect of whom an order is made under Sub-Section 1, disobeys the said order, shall be deemed to have committed an offence punishable under S. 269 of the I. P. C. The learned Crown Prosecutor suggested that this notional imputation of crime deprived the Magistrate of power to enquire into the elements which constitute the offence under S. 269. It would be dangerous to hold that the prosecution is not bound to prove the offence because the local legislature has enacted that a violation of the order of an executive officer is punishable under a particular section of the Code. The Penal Code is an all Indian Statute, and anybody charged under it has the right to expect of the prosecution proof that he has committed the offence as defined in the section. Turning to the Indian Penal Code, I find that to bring the offender within it, he should have unlawfully or negligently done an act which he knew or had reason to believe to be, likely to spread the infection of any disease dangerous to life. The accused in this case is not charged with disobeying the order of a public servant lawfully promulgated. He is charged with having knowingly spread the infection of disease. Therefore the question is not whether the order of the Health Officer in its inception was right, but whether the conduct of the accused in choosing the alternative of sending his son to an isolated house was an offence under S. 269.

Before I refer to cases I must draw attention to the language of the section. It uses the words "unlawfully or negligently" and not illegally. As was pointed out by Lord Ellenborough in *Rex* v. *Vantondills* [1] an indictment which charges a person to have done an act unlawfully or injuriously must assume or prove that there was no lawful excuse. Le Blanc, J., said this: "Neither did they pronounce that every person who inoculated for this disease was guilty of an offence, provided it was done in a proper manner, and the patient was kept from the society of others so as not to endanger communication of the disease. In such a case the law did not pronounce it to be an offence.

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[1] (1815) 4 M. & S. 73=105 E. R. 762.

So the gist of the unlawful act is that there must be danger of the infection spreading. If care is taken to avoid such an infection the act cannot be said to be unlawful or negligent. In fact the City Municipality Act contemplates that the action will not amount to an offence if a proper lodging or accommodation is found for the infected person. When we remember that S. 269 does not use the word illegal which has been defined by S. 43 as being applicale "to everything which is an offence or which is prohibited by law", but uses the word "unlawful", it is clear that the prosecution must make out not only that there has been disobedience to the order of the Health Officer but also that the disobedience was unlawful and negligent and had also the effect of spreading the infectious disease. The case near in point is *Cahoon* v. *Mathews* [1]. In that case a mother was directed to remove her daughter to an Isolation Hospital. She refused to comply with the order unless she was herself allowed to accompany her child. Thereupon she was charged under S. 269 of the I. P. C. The learned Judges held that as in her own house there were no lodgers, as the order to remove was passed upon a misapprehension as to the existence of lodgers and as sufficient accommodation was provided for the infected child, the mother did not unlawfully or negligently. The learned Judges say and I entirely agree with that observation of theirs :—" An Act however may be lawful though it may be illegal." Therefore although in the present case the refusal to comply with the direction of the Health Officer might have been illegal as defined in S. 43, I am not prepared to hold that it was unlawful when it is found that proper precautions were taken to prevent infection and to provide a suitable lodging for the person infected. I may refer in this connection to the weighty observations of Lord Blackburn and Lord Watson in *Metropolitan Asylum District* v. *Hill* [2]. Lord Blackburn said : "On those who seek to establish that the legislature intended to take away the private rights of individuals, lies the burden of showing that such an intention appears by express words or necessary implication". Lord Watson in the same case said:— "Where the terms of a statute are not imperative, but permissive,

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[1] I. L. R. 24 Cal. 494.

[2] (1881) L. R. 6 A. C. 193 at p. 208.

Kandaswami Mudaliar In re.

Seshagiri Aiyar, J.

the fair inference is that the legislature intended 'that the discretion as to the use of the general powers thereby conferred should be exercised in strict conformity with private rights." The Health Officer would have been well within his rights if he had told the accused that he should either provide a proper lodging for the son or he should remove the child to the Hospital. That would have been in the language of Lord Watson an exercise of discretion compatible with private rights. The mere failure to carry out an order which could otherwise have been *bona fide* obeyed by the avoidance of the danger of infection cannot be regarded as an offence under S. 269 of the I. P. C., I must, therefore, quash the cocviction. The learned Crown Prosecutor informed me that in case I came to the conclusion that the Magistrate was not justified in shutting out evidence, he was not prepared to press for the case being sent down for further enquiry. All that is necessary in a case of this decription is to state the principle which should guide the Magistrate under similar contingencies. The fine, if paid, must be refunded.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE MOORE.

Nadamuni Naidu ... *Petitioner** (*Accused*).

In re.

Nadamuni Nadar In re.

Madras City Municipal Act (III of 1904)—S. 262—Permission to erect shed—Necessity—License under S. 325—Effect—Permission to erect shed—Validity-Conditions.

A license under S. 325 of the Madras City Municipal Act does not cover the permission required under S. 262 of the Act. A person who has obtained a license for storing timber is therefore bound to take the permission of the Municipality for putting up a shed over it.

The permission to erect a shed given by the President must fix the period for which, and the boundaries over which, the shed is to be erected.

Corporation of Madras v. *Varadachariar* [1] followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the 2nd Presidency Magistrate, George Town, Madras dated 3rd May 1919 in C. C. No. 3767 of 1919.

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* Crl. Rev. Case No. 443 of 1919.

Crl Rev. Petition No. 380 of 1919. 17th October 1919.

[1] (1918) I. L. R. 42 Mad. 7.

K. S. Krishnaswami Aiyangar, for Petitioner.

The Crown Prosecutor (*Sydney Smith*), for the Crown.

The Court made the following

Order :—The question in this case is whether a person who has obtained a license for storing timber is not bound to take the permission of the Municipality for putting up a shed over it.

There was a license given for selling or storing timber to the petitioner. Apparently in the year 1908, he applied to Mr. Lloyd, the then President of the Municipality, for a license to erect a shed in the timber yard. Mr. Lloyd said in Ex. I "the undersigned will not insist on the pandal license fees being paid on the sheds used in their depots, as the license granted under S. 325 Act III of 1904 for using a place for the storage of timber covers in the opinion of the undersigned sheds necessary for the protection of timber so stored." Apparently Mr. Lloyd was under the impression that if there was a license for the storage of timber, that would cover the shed erected over it.

It was contended by the learned Vakil for the petitioner in this Court that the putting up of the shed is only necessary to carrying on the trade of a timber merchant. We are unable to agree with this contention. It is clear that the legislature has provided two distinct licenses in respect of the different matters. Section 325 refers to timber depôts and S. 262 to the erection of sheds with inflammable materials. Therefore in our opinion the President was mistaken in thinking that the license under S. 325 covered the permission required under S. 262 ; this is in accordance with the view taken by a Bench of this Court in *Corporation of Madras* v. *Varadachariar* [2].

It was next argued by the learned Vakil for the appellant that Mr. Lloyd's letter must be taken at least as a permission for erecting a shed. The obvious answer to this argument is that suggested by the learned Crown Prosecutor. If permission is to be granted under S. 325 of the City Municipal Act the period during which the permission is to be availed of must be mentioned and boundaries given. The letter of Mr. Lloyd does not purport to fix the period nor to give the boundaries

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1. (1918) I. L. R. 42 Mad. 7.

Nadamuni Nadar *In re.*

over which the shed is to be erected. No Municipal President has the power to give authority for all time to come to erect sheds and that is the reason why the legislature has imposed a restriction upon him to specify the period. Therefore we cannot regard the letter written by Mr. Lloyd as permission to erect a shed. It follows that the prosecution was well advised and was right.

As regards the sentence, having regard to the letter of Mr. Lloyd, we do not think that the fine of Rs. 25 is justified in the circumstances. We reduce it to Rs. 5.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE MOORE.

Vankamamidi Balakrishnayya and another ... *Appellants*,*
(Defendants);

v.

Vankamamidi Venkata Triambakam and another. *Respondents*
(Plaintiffs).

Vankamamidi Balakrishnayya v. Vankamamidi Venkata Triamkbakam

Hindu Law—Partition—Adopted son and subsequently born aurasa son—Partition between father, aurasa son and adopted son—Share of adopted son—The applicability of Vasishta's text.

In a partition between the father, his *aurasa* son and a son adopted before the birth of the *aurasa* son, the adopted son is entitled to one ninth share, the father and the *aurasa* son being each entitled to a four ninths share of the family properties.

The rule of Vasishta is applicable in all cases of partition of patrimony *interse* between the members of the joint family, the adopted son taking in such cases only a limited share.

In cases of collateral succession, the share of the adopted son is as extended as that of a natural born son.

Case law on the subject and the texts of Hindu Law, discussed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge of Guntur in Appeal Suit No. 237 of 1917 preferred against decree of the Court of the Additional District Munsif of Tenali in Original suit No. 246 of 1915 (O.S. No. 52 of 1915 on the file of the Principal District Munsif's Court, Tenali).

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* S. A. No. 1754 of 1918. 13th November 1919.

Vankamamidi Balakrishnayya v. Vankamamidi Venkata Triambakam.

A. Krishnaswami Aiyar, for Appellants.

P. Narayanamurthi, for Respondents.

The Court delivered the following

Judgment:—This is a suit for partition. The 1st Plaintiff is the father and the 2nd Plaintiff is his natural born son. The 1st defendant is his adopted son and the 2nd defendant is the son of that adopted son. The question for consideration is what is the share to which the 1st defendant, the adopted son is entiled when a suit is brought for partition and the father is party to that suit. A question was raised, which is referred to in the written statement, that, as before the birth of a second son there was an award of arbitrators settling the disputes between the 1st plaintiff and the 1st defendant, a decrce should be passed in pursuance of that award. The first issue related to that contention. The facts relating to that issue are these. The adoption of the 1st defendant was made in 1887 when the 1st plaintiff's first wife was alive. She died in 1888. First plaintiff contemplated marrying a second wife. Thereupon the natural father of the 1st defendant raised disputes, and asked that before the second marriage was performed the share of the 1st defendant should be set apart. It is said that in consequence of this objection by the natural father of the 1st defendant, the arbitrators settled the shares of the 1st plaintiff and the 1st defendant. The District Munsif was of opinion that as the award was not made a decree of Court and as it was not registered, it was not receivable in evidence; but he gave two plaintiffs and the 1st defendant a third share each in the property. He relied upon the decision in *Raja* v. *Subbaraya* [1], which has since been overruled by *Gopalam* v. *Venkataraghavulu* [2]. The Munsif also stated in his judgment that the genuineness of the award was not admitted by the plaintiffs. Against the decree of the Munsif there was an appeal to the Subordinate Judge. A memorandum of objections was also filed by the defendants. In that memorandum there is no claim that they should be given a half share under the award. The Subordinate Judge came to the conclusion that the share to which the 1st defendant was entitled was 1/9 of the property.

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1. (1883) I. L. R. 7 Mad. 253, 2. (1915) I. L. R. 40 Mad. 632.

Against this finding this second appeal has been preferred by the defendants. Mr. Krishnaswami Aiyar argued that the conclusion come to by the Lower Courts that the award is not receivable in evidence was wrong and that his clients were entitled to a finding whether the award was genuine or not, and to a decree in pursuance of that award. He considered that the appellants could not claim one half of that property as there was no memorandum of objections in the Lower Appellate Court, but argued that he is entitled to rely upon the award for the purpose of securing to support the decree of the District Munsif. We have come to the conclusion that it is not open to the appellants to rely upon that award. The genuineness was disputed. There was no attempt made in the Lower Appellate Court to base any claim upon the award. We have no affidavit before us by the appellants or by their pleader that this question was argued in the Lower Appellate Court. Under these circumstances we are of opinion that the defendants gave up their right under the first issue. As was held by the Judicial Committee in *Vankata Narasimha Naidu* v. *Bashyakarlu Naidu* [1] on a question of a disputed fact it is within the competence of the pleader or the parties to give up an issue; that is what seems to have happened in the Court. We are not prepared to remit the issue for a finding as to whether this award was genuine or not.

Now we come to the main question in the case and that is what is the share to which the 1st defendant is entitled where a suit is brought during the life-time of his adoptive father for settling the shares. There can be no doubt that if Manu's Text in Chapter IX Sloka 163 is to be applied literally the 1st defendant will be entitled to nothing more than maintenance. But Vignaneswara in commenting upon Yagnavalkya's text points out that this rule must be restricted to cases where the adopted son is not a good man. Since that time, three Smrithi writers at least have laid down the rule as regards the shares of the adopted son Vasishta, Katyayana and Bodhayana. All of them say that the adopted son, if a son is born to the adoptive father after the adoption, is entitled to ¼ share. In this Court it has

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1. (1902) I. L. R. 25 Mad. 367

consistently been held that the meaning of that text is that the property should be divided into five shares, four of which will be taken by the *aurasa* son and one will be taken by the adopted son.The contention of Mr. Krishnaswami Aiyar was that this rule being a restriction upon the natural rights of a son should be confined to cases where there is a partition between the brothers—between the adopted son and the natural born son and should not be applied to cases where a suit is brought by the father to divide the property. He. relied for this contention upon the latest pronouncement of the Judicial Committee in *Pratapsing Shivesing* v, *Agarsingji Raisingji* [1] where their Lordships point out that the adopted son, ordinarily speaking, is in the same position as a natural born son. That observation was made regarding the right of maintenance ; it was held that the fact that a person is adopted will not deprive him of the right, The learned Vakil also relied upon two other cases, *Nagindas Bhagvandas* v. *Bachoo Harkissondas* [2] was a case where the question was what was the share to which the adopted son was entitled in cases of collateral succession. The adopted son and the natural born son were the only two heirs who were alive when the succession opened, and it was held that the text of Vasishta was not applicable to such a case and that both the sons were entitled to the inheritance in equal moieties. In *Gangadhar Bogla* v, *Hiralal Bogla* [3] which related to the Stridhanam of a step-mother both Woodroffe and Mookerjee, JJ., point out that the exception should be confined within proper limits and should not be extended to cases of Stridhana succession, From these observations Mr. Krishnaswami Aiyar contended that the injunction of Vasishta should be confined to cases where the suit is brought by a natural born son against the adopted son or *vice versa* and should not be extended to cases where the suit is instituted in the life-time of the father. On principle there is no reason why such a limited application should be given to the texts of Vasishta or Bodhayana or Katyayana. In two cases of this Court the matter seems to have been taken for granted that even if such a suit is brought during the life-time of the father, the text of Vasishta will be applicable. (*Narasimhappa* v. *Chinnakenchapa* [1] and Appeal No. 104 of 1914). But in those cases there was no discussion upon this point. And naturally the learned vakil for the appellant contended that the decision is not binding upon him. We have therefore considered the text of the Hindu Law with some care and we are glad to say that our conclusion is in accordance with the decision come to in the two cases already cited. As was pointed out by Mr. Narayanamurthi for the respondents, in this portion of Mitakshara in S. 1 the whole discussion begins with a definition of Daya. The author says that properties are of two kinds, obstructed property and unobstructed property. First of all he deals with unobstructed property and then deals with obstructed property. The rules relating to partition are all contained in the sections dealing with unobstructed property. Here again, we must observe that the sections are not to be found in Vignaneswara's commentary but they were imported by Mr. Colebrooke who has very carefully analysed the commentary and has given headings which he thought were appropriate for the subject-matter discussed. In the first clause of S. 2 the rules relating to partition during the life-time of the father are considered. In S. 3 the rules relating to partition after the death of the father are considered and the other Ss. 4, 5, 6, 7, 8, 9, and 10 deal with matters which would be applicable to both classes of partition—partition during the life-time of the father and partition after his death. Section 11 in which the question as to the right of the adopted son when he is in competition with a natural born son is dealt with, must also be regarded as belonging to the same category as Sections 4 to 10 which have all a general application without reference either to the question of partition after the death of the father or partition before his death. There is no reason for saying that the text applies only to cases of partition after the death of the father. No doubt the language in Sanscrit to which Mr. Ramasamy Aiyar drew our attention in reply suggests that the commentator contemplated a state of things existing after the death of the father. But that would not show that this text is solely to be applied to cases where partition takes

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[1] (1918) 46 I. A. 97=36 M. L. J. 511. [2] (1915) I. L. R. 40 Bom. 270.
[3] (1916) I. L. R. 43 Cal. 944.

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1. (1917) 38 I. C. 244.

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place after the death of the father and not during his lifetime. After dealing with this portion of Yagnavalkya's next, Vignaneswara begins the next head of discussion, namely, obstructed properties. What has been laid down in the two cases decided by the Judicial Committee and by the Calcutta High Court relates to the second head of discussion, obstructed property. It was held in these cases that there is no reason for applying Section 11 to subjects covered by Chapter 2. In our opinion we will be doing no violence to the canon of interpretation suggested by the Judicial Committee and by the learned Judges of the Calcutta High Court by applying the rule in Section 11 to cases of partition during the life-time of the father because Section 11 is germane to the discussion relating to unobstructed property. In the Dattaka Chandrika, the Dattaka Mimamsa and the Saraswathi Vilasa, the rule of Vasishta is quoted as of general application to all cases of partition. The principle underlying these texts is that in the partition of the patrimony *interse* between the members of the family, the adopted son is only entitled to a limited share. In the case of collateral succession, his share is as extended as that of a natural born son. According to Bodhayana Sutram the adopted child has to give and provide at the time of adoption that he would not claim more than a fourth share of his father's property if a natural son is born. For these reasons we are of opinion that the Lower Courts were right in holding that Vasishta's Text is applicable to the present case. Applying that rule, the father and the natural son would between them be entitled to 8 shares and the adopted son to one share in the property.

We dismiss the second appeal with costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—Sir. JOHN WALLIS, CHIEF JUSTICE, AND MR. JUSTICE SADASIVA IYER.

Mr. R. P. Gill ... *Appellant** (*Plaintiff*).

v.

Lingamallu Varada Raghavayya and others. ... *Respondents* (*Defendants*).

Mr. R.P. Gill v. Lingamallu Varada Raghavayya.

Court Fees Act S. 7 (v) and Schedule II Article 17 (6) Suit by a co-tenant in possession for partition—Suit incapable of valuation—Court-fee payable on.

A suit by a co-tenant for partition of immoveable property of which he alleges he is in possession on behalf of himself and the other co-tenants is incapable of valuation within the meaning of Schedule II Article 17 (6) of the Court Fees Act and is not governed by S. 7 Clause V of that Act.

Tarachand Mukerji v. *Afzal Beg* [1] and *Ahamuddin Tamijuddin* v. *Amiruddin* [2] followed.

Reference under Court Fees Act, S. 5 [3] and *Dagdu* v *Tolaram* [4] dissented from.

Appeal against the order of the Court of the Temporary Subordinate Judge of Guntur dated 18th February, 1918 rejecting the plaint in the Original Suit of 1917 sought to be filed by Mr. G. V. Srinivasa Rao Vakil on behalf of the plaintiff Mr. R. P. Gill the plaintiff.

P. Narayanamurthi, for Appellant.

K. G. Babu Rao, for Respondents.

The Court delivered the following

Judgment :—In this case the plaintiff sues for partition of certain immoveable property of which he alleges he is in possession as a co-tenant on behalf of himself and the other co-tenants. This is not a suit to enforce a right to share in the possession of property on the ground that it is joint family property within the meaning of S. 7 (IV) (b) of the Court Fees Act VII of 1870 and therefore the question of the applicability of that sub-section to suits for the partition of joint family property which was decided by a Full Bench of this Court in *Rangiah Chetty* v. *Subramania Chetty* [5] does not arise.

There is a long course of decisions in Calcutta that a suit such as the present for a partition by a plaintiff alleging him-

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* Appeal No. 230 of 1918. 6th November, 1919.

1. (1911) I. L. R. 34 All. 184.
2. (1917) 44 I. C. 216.
3. (1894) 4 M. L. J. 110.
4. (1909) I. L. R. 33, B. 658.
5. (1910) 21 M. L. J. 21,

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self to be already in joint possession is incapable of valuation within the meaning of Schedule II Art. 17 (6) and is not governed by clause V of S. 7 and though the point was not expressly decided by the Full Bench in the case reported in *Rangiah Chetty* v. *Subramania Chetty* [1] the reasoning of all the learned Judges who heard the reference is in accordance with this view.

The same view is taken in *Tarachand Mukherji* v. *Afzal Beg* [2]. In these circumstances we are not prepared to agree with the decision in *Reference under the Court Fees Act, S. 5* [3], that the value of the subject-matter of such a suit is not incapable of valuation but easily ascertainable or with the decision in *Dagdu* v. *Tolaram* [4], assuming that the point arose in that case which is not clear. The balance of authority appears to us to be strongly in favour of the view that such a suit as the present is governed by Schedule II Article 17 Cl. 6, the latest case being *Ahamuddin Tamijuddin Amiruddin* [5] and we must so hold and set aside the order rejecting the plaint and remand the case to the lower Court for disposal according to law. Costs will abide the result:

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE OLDFIELD AND MR. JUSTICE SESHAGIRI AIYAR.

Arunachala Velan ... *Appellant* * (*Plaintiff*).
v.
Venkatarama Aiyar ... *Respondent* (*Defendants.*)

Arunachala Velan
v.
Venkatarama Aiyar.

Civil Procedure Code of 1908—*O.* 34 *R.* 6—*Mortgage—Personal decree—Application for—Maintainability — Condition omission to proceed against portion of mortgaged property—Effect.*

Where a mortgagee of 6 items of property sued upon the mortgage relinquishing without any reason whatever his claim to 4 items, obtained a decree for sale of only the remaining items, and, after the sale thereof, applied for a personal decree under Or. 34 R. 6 O. P. C., *held* that he was not entitled to a personal decree in as much as he had not exhausted his remedy in respect of all the items of the mortgaged property.

Per Seshagiri Aiyar, J.—The personal remedy should be enforced only when there is a deficiency after the sale of all the mortgaged property available for sale.

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* C. M. S. A. No. 75 of 1918. 4th February, 1919.

[1] (1910) 21 M. L. J. 21.

[2] (1911) I. L. R. 34 All. 184.

[3] (1894) 4 M. L. J. 110.

[4] (1909) I. L. R. 33 Bom. 658.

[5] (1917) 44 I. C. 216.

Arunachala Velan v. Venkatarama Aiyar.

Appeal against the order of the Court of the Subordinate Judge of Negapatam dated 26th April 1918 in A. S. No. 18 of 1918 (A. S. No. 676 of 1917 on the file of the District Court of Tanjore) preferred against the order of the Court of the District Munsif of Patukotta dated 26th February 1917 in I. A. No. 1574 of 1916, in O. S. No. 322 of 1913.

T. V. Gopalaswami Mudaliar, for Appellant.

S. Varadachariar, for the Respondent.

The Court delivered the following

Oldfield, J.,

Judgments :—*Oldfield, J* .—I concur with conclusion reached in the judgment, which my learned brother is about to deliver. Each case, as I understand him to hold, must be decided on its own merits ; and it is sufficient here that appellant, who by his own choice has proceeded and obtained a decree against a portion only of the mortgaged property, has suggested no reason whatever for exempting the remainder. That is a sufficient ground of decision in the present case : and whilst I agree that special circumstances may conceivably justify the grant of a personal decree, before the whole property comprised in the mortgage has been exhausted, I do not feel called on to attempt any definition of those circumstances or any estimate of the degree of difficulty in proceeding against the remaining profits, which would entitle the mortgagee to other relief.

The appeal fails and is dismissed with costs.

Seshagiri Aiyar, J.,

Seshagiri Aiyar, J. :—This appeal can be disposed of on a short point. The respondent executed a mortgage to the appellant in respect of six items of property. In the suit on the mortgage the appellant relinquished his claim to four items of property and obtained a decree for sale of only two of the six items. After selling the two items, he made an application for a personal decree under O. 34 R. 6, Civil Procedure Code. The District Munsif granted the application, relying upon *Sheo Prasad* v. *Behari Lal* [1] and *Ghafur Hasan Khan* v. *Muhamad Kifayatullah Khan* [2]. The Subordinate Judge was of opinion that the mortgage contained no personal covenant to pay and dismissed the application. It is doubtful whether this view of the Subordinate Judge is well founded, in the face of

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1. (1902) I. L. R. 25 A. 79.
2. (1905) I.L. R. 28 A. 19.

the decree and having regard to the language of the document. But I think that his decision can be supported on the ground that as the appellant has not exhausted his remedies in respect of all the items of the mortgaged property he is not entitled to a personal decree. I accept the reservation stated by Sir John Woodroffe in *Satish Ranjan Das* v. *Mercantile Bank of India Ltd.*,[1] that the matter must be looked at rationally and that the personal remedy should be enforced only when there is a deficiency after the sale of all the mortgaged property *available for sale.* In other words, if the mortgagee does all that is reasonably possible to bring to sale the mortgaged properties, his action should not be scanned with undue severity. The principle is that the decree-holder should take steps to bring the entire mortgaged property that may be available for sale. Sanderson, C. J., says : "that not less than the whole of the properties mentioned in the decree must be sold in order to comply with the provisions of the rules and with the terms of the decrees, that the question of sufficiency could not arise unless it was intended the whole should be sold, if necessary, to liquidate the amount secured by the mortgage." The case before the Calcutta High Court was one in which there was a decree in respect of all the mortgaged properties. But the mortgagee claimed a personal decree after selling only some items in the decree. The principle of that decision will apply with equal force to a case where the mortgagee without any reason relinquishes his claim in respect of some of the properties mortgaged. In the earlier case in that court *Ram Ranjan Chakravarthi* v. *Indra Narain Dass*[2] this was distinctly laid down. In that case substantial portions of the mortgaged property were not included in the decree and the application under Section 90 of the Transfer of Property Act was made after selling all the properties comprised in the decree. The learned Judges held that the mortgagee was not entitled to this relief. In the Madras High Court there is no direct decision. The observations in *Shanmugam Pillai* v. *Ramanathan Chetty*[3] point to the same conclusion. In that case one of the properties in respect of which decree was obtained was claimed by the brother of the judgment debtor. He was not a party to the decree. He had also instituted a suit for partition. In that suit, the property in dispute fell to the share of the brother. Thereupon the mortgagee without taking steps to sell that property, asked for a personal decree against his judgment-debtor. Muthusami Aiyar, J., held that he was entitled to such a decree. The learned Judge says: —" The respondent was therefore justified in not proceeding against Tyagaraja Pillai's share, lest by so doing he may run the risk of involving himself in litigation which may entail on him expense." This dictum shows that it is not the duty of a mortgagee to put himself to unnecessary expense and to involve himself in fruitless litigation before seeking for a personal decree. But it is clear from this case and from the Calcutta cases that it is not open to a mortgagee to give up his rights unreasonably against portions of the mortgaged property, with a view of making the judgment-debtor personally liable. The language of rules 5 and 6 of O. 34, Civil Procedure Code, suggests that such a procedure is not what the legislature contemplated. *prima facie* the mortgagee must include all the properties in the suit. Rule 5, clause 2 speaks of *the mortgaged property* being brought to sale. That means all the items mortgaged. The next clause "or a sufficient part thereof" indicates that discretion is given only where it is possible to get full satisfaction out of a portion of the properties mortgaged. Rule 6 directly makes it a condition precedent to the application that the net proceeds of " such sale ", namely the sale of the entire hypotheca, should be found insufficient to pay the amount due to the plaintiff. In Jones on Mortgages Vol. II, S. 1228-B the rule is thus stated : " The purpose of the foreclosure suit is to enforce the right of redemption and personal judgment in such a suit can only be awarded when the mortgaged premises will not produce the amount found to be collectable." The Allahabad High Court has consistently taken a different view. In *Sheo Prasad* v. *Behari Lal* [1] it was stated that there is nothing to prevent a mortgagee relinquishing his claim against a portion of the mortgaged property and then obtaining a decree under S. 90 of the Transfer of Property Act. With all deference, it seems to me that the meaning put upon

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[1] (1917) I. L. R. 45 C. 702.

[2] (1906) I. L. R. 33 C. 890.

[3] (1894) I. L. R. 17 M. 309 at p. 314=4 M. L. J. 91.

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[1] (1902) I. L. R. 25 A. 79.

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Seshagiri Aiyar, J.

the words 'of any such sale' is too narrow. The same view has been taken in *Ghafur Hasan Khan* v. *Mohamad Kifayat-ullah Khan* [1], and was accepted as good law in *Pirbu Narain Singh* v. *Amir Singh* [2]. In *Gopal Panda* v. *Baikunta Mahapatra* [3] the learned Judges say that if the mortgagee is not prejudiced by the giving up of certain items of property a personal decree can be passed. It is difficult to say how this prejudice can be ascertained. *Prima facie* when a personal decree is asked without recourse to the property mortgaged it would ordinarily prejudice the judgment-debtor.

I am free to confess that a great deal can be said for either view of the question. But the reason of the rule seems to be in favour of the Calcutta view and as a learned Judge of this court had very early adopted the same view, I prefer to follow those decisions and to hold that the mortgagee is not entitled to a personal decree in the present case. I would therefore dismiss the appeal with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE MOORE.

Kothamidde Ranga Reddi ... *Petitioner** (*Accused*).
In re.

Kothamidde Ranga Reddi.
In re.

Criminal Procedure Code Ss. 110 (*a*) *and* (*b*) *and* 117 (3)—*Evidence necessary to prove charges under—Evidence of repute, admissibility of—Hearsay evidence—Police reports, value of—Order under S.* 112, *contents of—Defect in order—Effect of.*

Where a preliminary order under S. 112 of the Criminal Procedure Code merely reproduces the clauses of S. 110 without setting forth the substance of the information against the accused the proceedings under S. 110 cannot be regarded as legal. Where however the defect in the preliminary order did not prejudice the accused in the trial and he let in all his evidence, the proceedings will not be quashed on the ground of the defect in the order.

When a person is charged under S. 110 (*f*) of the Cr. P. Code, evidence of general repute is not admissible to prove that he is a desperate and dangerous character. To prove the charge against him evidence of specific acts showing that he is a desperate and dangerous character. is necessary.

Per Seshagiri Iyer, J.—To sustain a charge under S. 110 cl. (*a*) to (*e*) of the Cr. P. Code, the evidence must relate to particular instances which have come to the knowledge of the deponent. Evidence relating to mere beliefs and opinion without

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* Cr. Rev. Case No. 860 of 1919 and Cr. Rev. Petition No 304 of 1919.
29th October, 1919.

[1] (1905) I. L. R. 28 A. 19.
[2] (1907) I. L. R. 29 A. 369.
[3] (1917) 2 Pat. L. J. 538.

Kothamidde Ranga Reddi. *In re.*

reference to acts or instances which are the grounds for such opinion, are hardly evidence of repute within S 117 (3) of the Criminal Procedure Code. Habitual criminality cannot be regarded as established by the repetition of beliefs and opinions.

In proceedings under S. 110 of the Cr. P. Code police evidence should, if not wholly discarded, be allowed to influence the judgment of the magistrate as little as possible.

Per Moore, J.—Hearsay evidence amounts to evidence of repute and is admissible for the purpose of proving a charge under S. 110 (*a*) to (*e*) of the Cr. P. Code. When it is sought to prove the reputation of a person the evidence required is that of respectable persons who are acquainted with the accused and live in the neighbourhood and are aware of his reputation. The test of the admissibility of the evidence of general opinion is whether it shows the general reputation of the accused and it should at least be the opinion of a considerable number of persons. It must not merely be the repetition of what certain persons have said to the witnesses.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898 praying the High Court to revise the order of the Court of the District Magistrate of Anantapur dated 21st December 1918 in Criminal Appeal No. 6 of 1918 preferred against the order of the Court of the Deputy Magistrate of Gooty dated 11th July 1918 in Mis. Case No. 13 of 1917.

T. Richmond, for the Petitioner.

V. L. Ethiraj, for the Public Prosecutor for the Crown.

The Court made the following

Seshagiri Aiyar, J.

Order : *Seshagiri Aiyar, J.*:—This is an application to revise the order of the District Magistrate of Anantapur confirming the proceedings taken by the Deputy Magistrate of Gooty calling upon the petitioner to enter into a bond for Rs. 5,000 with two sureties in a like sum. The first Magistrate was moved to take action under S. 110 (a) and (f) of the Code of Criminal Procedure, He examined a large number of witnesses, 38 for the prosecution and 41 for the defence. He came to the conclusion that the petitioner should be bound over. In confirming that order, the District Magistrate refers to a defect in the procedure of the trial Magistrate, namely, that in recording and reading out the preliminary order under S. 112, there was no attempt made to inform the accused of the substance of the information received which led to the taking of action against him. The District Magistrate says that the accused had ample opportunities in the course of the hearing to know what evidence was being given against him and, as he did not object to the legality of the preliminary order in the lower court, the objection should be overruled. Although I do not propose to set aside the order on the sole ground that the information communicated to the accused under S. 112 was not sufficient to comply with the requirements of the Code, I must point out that it is of the utmost importance in cases of this description that the first information should be clear and specific. The accused is to be put on his trial on information received behind his back. In the case of a complaint, the accused may be entitled to a copy, if he applies for it, but in the case of an information of this kind which, *ex necessitae* a confidential one, the accused is entitled to be told the nature and the extent of the information on which the Magistrate intends to base the action against him. It is that communication that is expected to enable the accused to summon witnesses on his side. Therefore if the substance of the report made to the Magistrate is not clearly disclosed and the accused is not informed of the charges, of the nature of evidence that he is to rebut, the proceedings cannot be regarded as legal. I entirely agree with the observations of my learned brother Kumaraswami Sastri, J. on this question.*

I now proceed to deal with the merits of the case. Objection was taken in this court by the learned counsel for the petitioner on the ground that most, if not the whole, of the evidence let on the side of the prosecution, was irrelevant and inadmissible in evidence. The District Magistrate classifies in paragraph 4 of his judgment the evidence that has been given. He refers first of all to what he considers to be the reputation evidence. As regards that, he says that if the order rested solely on it, he would have set it aside. What I understand him to mean is that, the evidence of repute against and for the accused is evenly balanced, that in the opinion of the appellate Magistrate it would be unsafe to base the proceedings solely upon it. There was a large volume of evidence adduced by the petitioner which showed that in the opinion of a considerable number of the people in and round the place the accused is a man of good character. If that is the view taken by the District Magistrate, there is nothing to be said against it. But I am not sure whether he does not, to some extent, confuse the issue by holding that evidence of repute is altogether inadmissible.

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* See *Kripasindu Naik* v. *Emperor* 19 Cr. L. J. 905.

It is desirable to point out here in what cases evidence of repute may be permitted in proceedings of this character and in what cases it should be avoided altogether. Under S. 110, there are six categories of offences : The first five relate to habitual misconduct ; and the sixth to the accused being desperate and dangerous. S, 117 clause (3) provides that that a person is a habitual offender may be proved by evidence of general repute or otherwise. This language is not very happy and Courts have been often at pains to understand the idea which led the legislature to enact this clause. The expression 'habitual offender', I believe, covers all the first five categories of offences mentioned in S. 110. One thing at least is clear, that to bring home the charge under S. 110, clause (f), evidence of general repute is not admissible. According to the ordinary rules of evidence, evidence is not admissible to prove that a man is of a bad character. Therefore clause (3) of S, 117 must be taken to have been introduced by way of exception to the general law. If that is so, the exception must be limited to the particular offences referred to in it. That I understand to have been the view taken by Justice Sankaran Nair in *Muthu Pillai* v. *Emperor* [1]. In that case it was contended for the Crown that, by admitting evidence of general repute for proving the first five categories of offences in S. 110, Courts can subsequently utilise it for showing that the person is of a desperate character. The learned Judge rightly overruled this suggestion because it would be enabling the Crown to let in evidence indirectly, which it cannot directly do. I am clear that it is not open to the Magistrate to look into evidence of general repute for finding that a man is a dangerous and is a desperate character within S. 110 (f) of the Code. Mr. Justice Bannerjea in *Emperor* v. *Bidhyapathi* [2] pointed out that it is only for the purpose of establishing charges under S. 110 clauses (a) to (e) that repute evidence is admissible. I am in entire agreement with the pronouncements of Sankaran Nair, J., and Bannerjea, J., on this matter.

The evidence let in in this case, would have therefore to be excluded to a considerable extent. The District Magistrate divides the rest of the evidence into two classes, the evidence of official witnesses of sufficient standing, and the evidence of witnesses who speak of particular acts of criminality on the part of the accused. Under the first heading, he relies mainly upon the evidence of a Deputy Superintendent of Police, two, Inspectors of Police and some Sub-Inspectors of Police. One caution which the learned Magistrate has not kept in view is that in proceedings of this kind as far as possible the evidence of official witnesses like Superintendents of Police and Inspectors of Police should be eschewed. Their minds are naturally biased by the reports that they receive from their subordinates regarding the movements and antecedents of the accused when they report to the Magistrate that he should be bound over. Therefore their evidence would in the nature of things ordinarily exhibit bias against the accused. This was pointed out in 16 Crl. L. J. 281.* It is a very salutary principle that although there is no rule of law which prohibits a Magistrate from admitting Police evidence, it should, if not wholly discarded, influence his judgment as little as possible. Bearing this in mind, I shall now examine the evidence given by the Superintendent of Police. He says that he knew the accused's reputation and straightway he speaks of having heard of the accused being concerned in the getting up of dacoities. Then he says as regards one of the cases the accused is said to have engineered : "I sent the Head Constable to Tadpatri and found the allegations to be true." This is both opinion and hearsay evidence. Then he refers to the entries in his diary of his having been convinced that one of the articles found on a search in the house of the accused being stolen property. If that was the conviction of the witness, why he did not charge the accused before a criminal Court. The whole of this evidence, however much it may express the honest opinion of the officer, is either hearsay or rumour or a priori conclusion of the witness on one-sided representations made to him. There is not a single fact spoken to excepting that relating to the ear-ring. As regards the identity of the ear-ring, the owner has not been examined to prove that it was his property and was stolen from him. The whole of this evidence, namely that of prosecution witness No. 18 must be rejected. Then I turn to another witness, P. W. No.31. He is the Circle Inspector. He first refers to the accused

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[1] (1910) I. L. R. 34 Mad. 255.
[2] (1903) I. L. R. 25 All. 273.

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* *Abdul Khaliq* v. *Emperor*, 13 A. L. J. 412=16 Cr. L. J. 281.

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Seshagiri Aiyar, J.

having been entered in the surveillance register, then to a letter from the Superintendent of Anantapur to another Superintendent which the witness was permitted to look into in which it was mentioned that the accused organised a gang of dacoits. Then he refers to his having heard that some Juttur men were members of a gang. Then he refers to an entry in his diary that the accused put an advance of Rs. 50 for purchasing a ticket and so on. In cross examination he said " I made no enquiries regarding the purchasing of tickets." The whole of this evidence must be set aside. The same remark applied to the evidence of the 7th witness. He says that he once went to the house of the accused to check his presence. The accused refused to give him information. " I wrote in my note book what took place." Why this evidence was recorded and how the trial Magistrate considered it as relevant, I cannot understand. The evidence of the other Police witnesses, is of the same description as that to which I have referred. It seems to me that this evidence should be regarded as inadmissible, even if it was given by a private party. They are further vitiated by the fact that it is a record of opinions, rumours and hearsays which, as Police officers, they entered in their notebooks.

Then I turn to the second class of witnesses. The District Magistrate specially refers to the evidence of prosecution witness No. 16 and P. W. No. 17. As regards P. W. No. 16 in my opinion, it is very irrelevant to say the least. The vakil says that he heard from somebody that a dacoity was about to be committed in the house of a client of his and that he warned that client. How is this an evidence against the accused ? The learned Public Prosecutor said that this evidence must be read with that of P. W. No. 17. P. W. No. 17 says "I know the accused. He bears a bad reputation and he is given to commit burglary, dacoity and has bad associates." Such a general statement can be of no assistance to a court. It is against all principles to record such vague statements without calling the witness to give specific instances which could be scrutinised and which the accused will be in a position to rebut. He says later on " the dacoits were expected to proceed to Juttur and from the house of the accused."

He admits as a matter of fact that owing to his vigilance and the vigilance of his friend, no dacoity took place. This very unsatisfactory evidence should not have been allowed to influence the mind of the Magistrate against the accused. P. W. No. 12 only says that the accused and his men returned on a particular occasion to their houses saying that Subba Reddi escaped. The 13th witness deposed that about four months back the accused was talking of murdering Subba Reddy. He said he went to the house where he heard the conversation as a cooly to do work for the owner ; but he did not inform anybody about the intended murder and that nothing afterwards happened. This kind of evidence can be manufactured against any individual respectable or otherwise and no man's reputation can be safe if evidence like this were to influence the proceedings of a Magistrate. I feel considerable doubts whether evidence as regards clauses (a) to (e) of S. 110 should not relate to something in the nature of previous convictions. The learned Public Prosecutor drew our attention to *In the matter of Siva Reddi* [1] wherein the learned Judges say "Although witnesses are examined as to general character, their testimony is not of much value as to the habits of a suspected person unless they can in support of their opinion adduce instances of misconduct when the question is only as to his repute. The evidence of witnesses if reliable is not without value though they may not be able to connect the suspected person with the actual commission of crime". I am not sure that I understand this judgment. S. 110 clauses (a) to (e) speak of a man being a habitual robber a habitual receiver of stolen property and a habitual harbourer, of thieves, a habitual extortioner, or a habitual committer of the breach of the peace. In my opinion the evidence on which the Magistrate has to base his conclusion must relate to particular instances which have come to the knowledge of the deponent and must be so specific. Evidence relating to mere beliefs and opinions without reference to acts or instances which have induced the witnesses to form the opinion, can hardly be regarded as evidence of repute within S. 117 clause (3). Habitual criminality cannot be regarded as established by the repetition of beliefs and opinions. At any rate, courts ought to discard such evidence as much as possible. *Emperor*

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[1] (1881) I. L. R. 3 M. 238.

Seshagiri Aiyar, J.

v. *Sheikh Abdul* [1], *Chintamon Singh* v. *Emperor* [2] and *Kalai Haldar* v *Emperor* [3] seem to lay down this view, and I respectfully follow these decisions. Therefore the evidence of P. W. No. 13 which speaks generally of the reputation of the accused without reference to specific acts is not in my opinion sufficient to bring the charge home to the accused.

The petitioner is a young man of 20 years of age and is in fairly well-to-do circumstances. It is said that he has property worth about a lakh of rupees and debts to the extent thirty thousand rupees' These debts have all been purchased by P. W. No. 22, a distant relation of the accused. It is he that moved the Police to take action in the matter. He has put pressure to bear upon the accused by purchasing litigation. There has not been a single instance in which the accused has been convicted of any offence. Under these circumstances, having regard to the nature of the offence charged and to the character of the evidence let in I feel no doubt that the proceedings should be set aside altogether. The bond executed by the petitioner and. by his sureties should be cancelled and given up.

Moore, J.

Moore, J. :—The petitioner has been ordered under S. 118 of the Criminal Procedure Code to enter into a bond for Rs. 5,000 with two sureties for a like amount to be of good behaviour for a period of three years.

The facts of the case are unusual. The petitioner is a Reddi owning landed property and paying an assessment of Rs. 1,000. The Police moved the Sub-Divisional Magistrate of Gooty for security being taken from the petitioner under S. 119 clauses (a) and (f) of the Code of Criminal Procedure on the ground (1) that he was by habit, a robber, house-breaker and thief and (2) that he was so desperate and dangerous as to render his being at large hazardous to the community. The Sub-Divisional Magistrate in the preliminary order which he issued under S. 112 of the Code of Criminal Procedure did not set out the substance of the information contained in the Police charge sheet. The order merely reproduces the language of clause (a) and (f) of S. 110 of the Code of Criminal

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[1] (1916) I. L. R. 43 Cal. 1128. [2] (1907) I. L. R. 35 Cal. 243.
[3] (1901) I. L. R. 29 Cal. 779.

Kothamidde Ranga Reddi. *In re.*

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Procedure. This was clearly irregular. " A notice under S. 110 of the Code of Criminal Procedure must contain something more than a reproduction of the clauses of the section. There should be sufficient indication of the time and place of the acts charged and sufficient details to enable the accused to know what facts he has to meet." (Per *Kumaraswami Sastri J.* in *Kripasindhu Naick* v. *Emperor* [1]). However I agree with the District Magistrate that this defect is not a sufficient ground for quashing the proceedings as it is not shown that the petitioner was prejudiced by the defect. After a protracted enquiry the Sub-Divisional Magistrate passed an order requiring the petitioner to give security and on appeal the order was confirmed by the District Magistrate. The first objection taken by Mr. Richmond for the petitioner is that a charge under clause (f) of S. 110 of the Code of Criminal Procedure cannot be proved by evidence of repute but must be proved by definite evidence and reliance is placed on *Muthu Pillai* v. *Emperor* [2]. In that case Mr. Justice Sankaran Nair held following *Kalai Haldar* v. *Emperor* [3] that when a person is *solely* charged under S. 110 (f) of the Code of Criminal Procedure evidence of general repute is not admissible to prove that he is a desperate and dangerous character. That is clear from the wording of S. 117 (3) of the Code of Criminal Procedure which says that for the purposes of this section the fact that a person is an *habitual* offender may be proved by evidence of repute or otherwise. The learned Judge, did not, however, express any opinion on the question whether when a person is tried jointly for charges under clause (f) and any other clause of S. 110 of the Code of Criminal Procedure a finding that he is an habitual offender can be taken into consideration in deciding the charge under clause (f). The lower Courts have not in my opinion kept in view the distinction between evidence as to general repute which was undoubtedly admissible to prove that the petitioner was an habitual offender and the evidence requisite to prove a charge under clause (f) which must be of a definite character. The Sub-Divisional Magistrate for instance says that the witnesses speak of " specific acts of misconduct attributed to the accused which in fact form the basis for their information and impression. The evidence against the accused is so general and overwhelming that there is not the slightest doubt that he associates and intrigues with criminals and bad characters and has been in the habit of committing dacoities, house-breakings, and thefts or other offences of the kind specified." Finally, the Sub-Divisional Magistrate says "I am perfectly satisfied from all the foregoing that the accused is by habit a robber, house-breaker, and thief and that his being at large without security is hazardous to the community." The District Magistrate has fallen into the same error. He states that "most of the evidence on either side concerns the reputation of the appellant...............while many of the witnesses for the prosecution say that the appellant has a reputation for habitual engineering of dacoities, robberies and thefts, and that he is dangerous to society."

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[1] (1918) 19 Cr. L. J. 905.

[2] (1910) I. L. R. 34 Mad. 255.

[3] (1901) I. L. R. 29 Cal. 779.

The next objection taken by Mr. Richmond is that the Magistrate erred in admitting a large body of irrelevant and hearsay evidence in the belief that it was admissible as evidence of repute. This objection, is, I think, well-founded. Hearsay evidence amounts to evidence of repute and is admissible for the purpose of S. 110 of the Code of Criminal Procedure and this provision of the law being an exception to the general rule of evidence and in such case evidence of repute though hearsay is admissible. *Emperor* v. *Fulchand* [1], *In the matter of Siva Reddi* [2]: But as was pointed out in *Rai Isri Pershad* v. *Queen Empress* [3], a case which is frequently quoted. "It is hardly necessary to say that evidence of rumour is mere hearsay evidence, and hearsay evidence of a particular fact. Evidence of repute is a totally different thing. A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen, and if it is proved that a man who lives in a particular place is looked upon by his fellowmen, whether they happen to know him or not, as a man of good repute that is strong evidence that he is a man of that character. On the other hand, if the state of things is that the body of his fellow-townsmen who know him,

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[1] (1903) 6 Bom. L. R. 34.

[2] (1887) I. L. R. 3 Mad. 238.

[3] (1895) I. L. R. 23 Cal. 621.

Kothamidde Ranga Reddi. *In re.*

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look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character, but to say that because there are rumours in a particular place among a certain class of people that a man has done a particular act or has characteristics of a certain kind, these rumours are in themselves evidence under this section is to say that the law does not justify us in saying." When it is sought to prove the reputation of a person the evidence which is required is that of respectable persons who are acquainted with the accused and live in the neighbourhood and are aware of his reputation. The test of the admissibility of the evidence of general opinion is whether it shows the general reputation of the accused and it should at the least be the opinion of a considerable number of persons. It must not be merely the repetition of what certain persons have said to the witnesses. Coming now to the facts of the present case the evidence of the accused's general repute and bad livelihood when examined is very weak and largely hearsay. [His Lordship then deals with the evidence].

There is also the evidence of a number of police officers, P. W. Nos. 1, 2, 3, 4, 7, 18, 19, 20, 25 and 31 that the petitioner is a registered suspect, that he and his brother-in-law are reputed to organise dacoities and that his house had been more than once searched. I have read the evidence of those witnesses and I do not think that much weight can be attached to it. The witnesses admit that the accused has never been charged in any case. The evidence of the police witnesses amounts to this that rumours are current in the Police circle that the petitioner organises dacoities and is an associate of bad characters and that his movements have been watched. For the foregoing reasons I consider that there is not sufficient evidence to support the charge under S. 110 (*a*) of the Code of Criminal Procedure, that the petitioner is by habit a thief or a dacoit.

As regards the charge under S. 110 (*f*) it has been held in *Kalai Haldar* v. *Emperor* [1] that to prove a charge that an accused person is so desperate and dangerous as to render his being at large without security hazardous to the community

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1. (1901) I. L. R. 29 Cal. 779.

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there should be proof of specific acts showing that he is a desperate and dangerous character. I respectfully agree with this decision. Practically the only evidence on this part of the case is that of P. W. Nos. 16, 17, 12, 13 and 22. [His Lordship then deals with that evidence in detail].

I am unable to agree with the District Magistrate that there is a large body of evidence "regarding the petitioner's bad life, his habit of engineering crimes and his general desperate character." The evidence on record does not warrant any such conclusion. The District Magistrate also says that there is evidence of witnesses who speak to "definite acts of criminality on the part of the petitioner", but I cannot find any definite evidence of any specific acts of violence committed by the petitioner. In my opinion the order requiring the petitioner to furnish security to be of good behaviour cannot be supported and should be set aside.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE BURN.

M. R. Venkatrama Aiyar ... *Appellant* * *(1st defendant.)*

v.

The South Indian Bank, Limited, Tinnevelly, through its authorised agent K. S. Venkatachalam Aiyar and others. *Respondents (Plaintiffs Nos. 1 to 6, 8, and 9 and Defendants Nos. 2 and 3).*

M.R. Venkatrama Aiyar *v.* The South Indian Bank Limited.

Civil Procedure Code, S. 73—Rateable distribution—Rival applicants—Suit for declaration that decree of rival decree-holder is fraudulent and collusive—Suit, if maintainable before actual distribution of assets—Decree, setting aside—Grounds on which one decree-holder can impeach decree of rival decree-holder—Absence of consideration, not a sufficient ground.

Where several creditors have obtained decrees against the same debtor and all of them claim rateable distribution of his assets, it is not open to one or some of the creditors, to impeach the decree of a rival creditor except on the ground of fraud or collusion between the debtor and the creditor in the obtaining of the decree. The mere fact that the rival creditor obtained an *ex-parte* decree against the debtor on perjured evidence, would not enable the other creditors to impeach the decree collaterally. The decree is conclusive evidence of the legal relationship of debtor and creditor and of the amount of the debt, not only as between the

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* A. S. No. 336 of 1918. 28th October, 1919.

M.R. Venkatrama Aiyar
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parties to it, but also as against the other creditors of the judgment-debtor. *Srinivasa Aiyangar* v. *Srinivasa Aiyangar* [1], *Suppa Bhattar* v. *Soppu Sokkayya Bhattar* , *Kadirvelu Nainar* v. *Kuppuswami Naicker* [3], Relied on.

Before the assets are actually distributed among the several applicants for rateable distribution, it is open to a decree-holder to bring a suit for a declaration that the decree of a rival decree-holder against the common judgment-debtor is fraudulent and collusive and for an injunction restraining the rival decree-holder from obtaining a rateable distribution of the assets. The plaintiff's remedy is not confined to a suit under S. 73 cl. (2) of the C. P. Code for refund of the assets after distribution. *Parusurama Pattar* v. *Veeraraghava Pattar* [4] distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Negapatam in O. S. No. 22 of 1913.

The facts material to this report are stated in the judgment of Burn, J.

K. Srinivasa Aiyangar, K. V. Krishnaswami Aiyar, K. S. Jayarama Aiyar and *N. Swaminadha Aiyar,* for Appellants.

The Hon. M. D. Devadoss, T. Rangachariar, C. P. Ramaswami Aiyar, A. Duraiswami Aiyar, K. Bashyam and *Brightwell* and *Moresley,* for the several Respondents.

The Court, delivered the following

Burn, J.

Judgments :—*Burn, J.* :—Plaintiffs are creditors of Vynagaram Lakshmana Chetty and Nataraja Aiyar. The former was carrying on money-lending business in the Tanjore District with a head office at Kumbakonam and branches at Mudigondan and Negapatam. The firm also did business in Madras, Calcutta, Singapore and other places. Nataraja Aiyar was associated with the firm, and it is suggested that when its credit was failing, his assistance was sought inorder to improve the financial position. At the time the transaction now in question was entered into, he was a young man of considerable means. Lakshmana Chetty is now an insolvent and the whereabouts of Nataraja Aiyar are said to be unkown. Plaintiffs' witness No. 1 the defendant and Narayana Sastri were respectively the agents of the firm at Kumbakonam, Mudikondan and Negapatam. The plaintiffs have obtained decrees against their debtors and considerable sums realised in execution were held by the Negapatam Sub-Court. The 1st defendant also obtained a decree in O. S. No. 26 of 1910 against the same debtors and he applied under S. 73 of the Code of Civil Procedure for rateable distribution along with the plaintiffs. In the ordinary course the 1st defendant would admittedly be entitled to a share in the assets realised. At the time the applications were disposed of by the Court, proceedings were pending in the High Court which, if decided against the 1st defendant would have resulted in his decree which was passed *ex parte* being set aside. The Court in ordering rateable distribution directed that the proportionate share to which the 1st defendant would be entitled on the basis of his decree should be retained in Court while the sums due to the other judgment-creditors were disbursed. The proceedings in the High Court terminated in favour of the 1st defendant. But the amount rateably due to him has not actually been paid and is still in Court deposit. The decree in O. S. No. 26 of 1910 is dated 16th April 1910, but the final order of the High Court was not passed until 7th December 1912. On 9th January 1913, the present suit was instituted. The relief sought was a declaration that the defendant was not entitled to participate in the distribution of assets under S. 73 of the Code of Civil Procedure. It was alleged in the plaint that the decree in O. S. No. 26 of 1910 had been obtained by means of fraud and collusion; and it was further asserted that the promissory note on which the 1st defendant's claim was based was entirely unsupported by consideration. The suit was dismissed on 22nd December 1915, the Subordinate Judge holding that it was not sustainable without a prayer for consequential relief. He also held that the suit for declaration as prayed for in this case would not lie where actual payment had not been made under the provisions of S. 73.

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[1] (1910) I. L. R. 33 Mad. 483 ; 20 M. L. J. 546.
[2] (1915) 29 M. L. J. 558.
[3] (1918) I. L. R. 41 Mad. 743=34 M. L. J. 590.
[4] (1897) 7 M. L. J. 277.

On appeal to the High Court (Appeal No. 21 of 1916) the decision of the Subordinate Judge was set aside after permission had been granted to the plaintiffs to amend the plaint by adding a prayer for consequential relief by way of injunction. This point and a question of stamp duty are the only matters dealt with in the judgment of the High Court.

On the re-hearing in the Sub-Court of Negapatam, the contest before the Subordinate Judge related firstly to questions of fact as to whether there had been any fraud or collusion in obtaining the decree in O. S. No. 26 of 1910 and whether the promissory note in favour of the 1st defendant was supported by consideration or not; and secondly to questions of law relating to the maintainability of a suit of this nature. The Subordinate Judge found that there was no consideration for the promissory note, and that except, in one particular, there had been no extrinsic fraud or collusion in obtaining the decree.

On the questions of law, he found that the suit was maintainable and granted the plaintiffs the declaration and injunction prayed for. The first defendant appeals.

With regard to the finding as to fraud and collusion the Subordinate Judge came to the conclusion that as far as Nataraja Aiyar and the proceedings taken by him are concerned there was no collusion of any kind between him and the 1st defendant. On the evidence no other conclusion was possible. The other defendant in the suit Lakshmana Chetty, was proceeded against through his agent at Negapatam, Narayana Sastri. Collusion is not alleged but as to fraud the Subordinate Judge, as I understand him, is of opinon that the impleading of Narayana Sastri as the agent of Lakshmana Chetty was a fraudulent act on the part of the 1st defendant. This is based on the ground that the agency of Narayana Sastri which had admittedly existed had been terminated prior to the institution of O. S. 26 of 1910 to the knowledge of 1st defendant. The agency is said to have come to an end owing to the insolvency of Lakshmana Chetty. Adjudication in insolvency would have this effect under S. 201 of the Contract Act.

The facts as to the insolvency proceedings are these: a creditor's petition was presented against Lakshmana Chetty to declare him insolvent on 7th October 1908. This was in the District Court of Madura. He was declared insolvent on 29th March 1909 by the Sub-Court, Madura (East). That order was subsequently annulled on 18th October 1909 as the Subordinate Judge found that he had acted without jurisdiction. Eventually an order adjudicating Lakshmana Chetty an insolvent was passed in the District Court of Madura on the 29th September 1910. It is clear from these proceedings that neither at the time when O. S. No. 26 of 1910 was instituted nor at the time when the decree in O. S. No. 26 of 1910 was passed was Lakshmana Chetty an insolvent. The order of adjudication which had been previously passed having been made without jurisdiction was a nullity.

It is also pointed out that in another suit O. S. No. 32 of 1908 the defendant himself had pleaded that Narayana Sastri was not Lakshmana Chetty's agent. All that is stated in the written statement in that suit is that Narayana Sastri "had no power to file this plaint." I do not think that the written statement can be taken as asserting that the agency was no longer existing The evidence of plaintiff's witness No. 1 shows that Narayana Sastri did continue to conduct the affairs of the firm long after the institution of the insolvency proceedings. The Kumbakonam branch was closed in June 1908 and according to plaintiffs' witness No. 1 the whole of the accounts were handed over to Narayana Sastri. There is no proof that he had ceased to be agent of the Chetty before the decree in O. S. No. 26 of 1910 was obtained. He did not defend the suit but it cannot be inferred from this that the agency had terminated or that there was collusion. It is not clear that any part of the assets held by the Court was realised from Lakshmana Chetty's properties.

The next question is whether the promissory-note on which the 1st defendant sued was supported by consideration. [His Lordship next discusses the evidence at length and comes to the conclusion that the promissory note was not supported by consideration].

The facts then are that the decree in O. S. No. 26 of 1910 was not obtained by collusion, that there was no extraneous fraud but that the promissory note on which the decree is based was unsupported by consideration. As far as the parties to the suit are concerned the judgment is final and there are no circumstances which would enable them to have it set aside. (*Chinnayya* v. *Ramanna* [1], *Kadirvelu Nainar* v. *Kuppuswami Naiker* [2]). An order in 1st defendant's favour for rateable distribution has been passed but no payment has been made to him. It remains to be determined whether it is open to third parties in the position of the plaintiffs to impugn the validity of the decree and whether a suit for a declaration of this kind is maintainable.

The latter point may be considered first.

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[1] (1918) I.L.R. 38 Mad. 203=25 M.L.J. 228. [2] (1918) I. L. R. 41 Mad. 743.

The question is whether the suit is premature because the share of the 1st defendant has not been disbursed. Once assets have been disbursed clause 2 of Sec. 73 of the Civil Procedure Code, 1908, expressly provides for a suit for refund where the payment has been made to a person not entitled to receive it. The contention for the appellant is that the plaintiffs have no cause of action until payment has been made and that a suit for declaration will not lie. Two decisions of this Court have been relied upon, *Parasurama Pattar* v. *Veeraraghava Pattar* [1] and an unreported case C. C. C. Appeal No. 31 of 1909 (Exhibit I). In the former case a decree-holder had been paid the whole sum realised by him in execution of his decree as the application of another decree-holder for rateable distribution had been dismissed. The latter succeeded in getting the order of dismissal set aside and the former was directed to pay back into Court the sum he had drawn. He then sued for a declaration that the other claimant was not entitled to rateable distribution but as no assets had come in the latter's hands it was held that the suit was not maintainable. *Hart* v. *Tara Prasanna Mukerji* [2] is referred to. There the Court had ordered under Sec. 295 (S. 73 of the Code of Civil Procedure, 1908) that the whole sum realised by the defendant in execution proceedings should be paid to him in spite of plaintiff's application for rateable distribution. No disbursement was however made. The plaintiff sued for payment out of Court to him of the sum which he claimed as rateably due. The question whether a declaration suit was maintainable was raised in the arguments. The judgment however proceeds on the basis that the suit was brought under the provisions of S. 295 and the decision is that it would not lie because assets had not come into the hands of the defendant. There is no suggestion in the judgment that any other remedy was open to the plaintiff.

In *Trailokya Nath Adhya* v. *Pulin Behari Baral,* [3] it was held that a suit would lie for a declaration that a decree-holder who was otherwise qualified to get rateable distribution under S. 73 was not entitled to receive payment on the ground that his decree had been obtained by collusion and fraud. The decision in *Hart* v. *Tara Prasanna Mukherji* [2] was

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[1] (1897) 7 M. L. J. 277.

[2] (1885) I. L. R. 11 Cal. 718.

[3] (1904) 3 C. L. J. 385.

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distinguished on the ground that the prayer was for a refund. The plaintiff had asked in the alternative for recovery from the defendant in the event of payment having been made but the report indicates that this event had not happened and he also asked for payment out of the assets held by the Court.

Both the Calcutta cases were considered in C. C. C. Appeal No. 31 of 1909. The facts on which the declaration was sought are not stated in the judgment. Apparently it was not a case in which the decree was attached on the ground of collusion. The decision in *Parasurama Pattar* v. *Veeraraghava Pattar* [1], was followed and it also was a case in which the right to distribution was not disputed on the ground that the decree was collusive. The case of *Trailokya Nath Adhya* v. *Pulin Behari Baral* [2] is referred to as being in favour of the maintainability of a declaratory suit and it is remarked that the decision may perhaps be distinguished on the ground that the decree of the rival decree-holder was alleged to be collusive. It was held that a suit for a declaration was not maintainable and it was pointed out that the legislature had provided a special machinery for a limited purpose and a special remedy for determining questions of right which might arise. To hold that such a suit is not maintainable would result in many instances in depriving the plaintiff of his only effective remedy. The Madras cases do not decide that such a suit is not maintainable when the decree is attacked on the ground of collusion. That is the case which was put forward in the plaint. In the absence of proof of collusion the suit in my opinion will fail on another ground and therefore this point need not be dealt with further. The case of the respondents is that as they were not parties in O. S. No. 26 of 1910 and as the judgment is only *in personam* they are entitled to have it vacated even on grounds which would not be open to the defendants in the suit. The judgment is said to be only a piece of evidence as to the existence of a debt which it is open to the respondents to rebut and which they have succeeded in rebutting. The Subordinate Judge has held that the facts that Exhibit H was not supported by consideration and that the defendant must have supported his claim by false evidence are sufficient to entitle the plaintiffs who held decrees against the same judgment-debtors to the relief they pray for in this suit. It is contended before us that this view is wrong. It is conceded that cases of collusion or proceedings in bankruptcy stand on a different footing. The argument advanced is that apart from the exceptions just mentioned, the plaintiffs would be entitled to relief in such circumstances only to which the principle illustrated by Section 53 of the Transfer of Property Act is applicable. The fact that there has been a fraud by one creditor on the Judgment-debtor will not enable other creditors to dispute the validity of the decree where the fraud was not aimed at them and they held no direct interest in the suit.

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[1] (1897) 7 M. L. J. 277.

[2] (1904) 3. Cal. L. J. 385.

A number of English cases have been cited but it is unnecessary to deal with them at length because all the decisions relate to bankruptcy proceedings and there is really no controversy as to the powers of a Court exercising bankruptcy jurisdiction. *Ex parte Kibble* : *In re Onslow* [1], *Ex parte Lennox* : *In re Lennox* [2] *In re Fraser, Ex parte Central Bank of London* [3] and *In re Hawkins, Ex parte Troup* [4] were referred to.

These cases establish that the mere fact that a debt which is sought to be proved is founded on a judgment does not prevent the trustee in bankruptcy inquiring into the reality of the debt on which the judgment is based. Such an inquiry may be held even before a receiving order has been made and even at the instance of the debtor although the latter would be estopped by the judgment from disputing the existence of the debt in any other forum. In order to justify the rejection of the debt by the Court, it is not necessary that there should be proof of collusion or of fraud. It is enough that the transaction should have been unfair and unreasonable. (*vide In re Hawkins*: *Ex-parte Troup* [4]). It is clear from the judgments that the decisions are based on the peculiar powers of the Court of Bankruptcy. The Court is charged with the administration of the estate for the benefit of the whole body of creditors and the interference of the Court has far-reaching and permanent effects on their rights. The proceedings in bankruptcy are the acts of the Court and it is not estopped by any prior conduct on the part of the debtor, by any engagements he may have entered into or by any decrees which may have been passed against him from inquiring into the true nature of the transactions so that the assets may be equitably distributed between the *bona fide* creditors of the bankrupt. These decisions do not touch the question of the rights of third parties to attack decrees on their own account. If the 1st defendant seeks to prove his debt in the Insolvency Court in order to share in the assets of Lutchmana Chetty held by the Receiver, it may be open to the Court to go behind the judgment in O. S. No. 26 of 1910 and inquire into the consideration for Exhibit H. There is nothing in the cases cited to support the plaintiff's contention as to the maintainability of the present suit. In this view, it is hardly necessary to notice the further argument that a Court acting under S. 73 of the Code of Civil Procedure is invested with powers similar to those exercisable in insolvency proceedings. I think the correctness of this proposition is doubtful.

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[1] (1875) L. R. 10 Ch. 373.

[2] (1885) 16 Q. B. D. 315.

[3] (1892) 2 Q. B. 633.

[4] (1895) 1 Q. B. 404.

In *Re Sunder Das* [1] it has no doubt been held that the Court has a right to inquire whether any decree on which rateable distribution is claimed is a sham decree or not. The reason given is one which furnishes a ground for the interference of a Court of Bankruptcy in such matters, namely that a debtor should not be allowed to defeat the rights of his *bona fide* creditors by means of claims brought into existence collusively for this very purpose. In *Shankar Sarup* v. *Mejo Mal* [2] the Judicial Committee expressed the following view as to the nature of proceedings under S. 295 (73) of the Code of Civil Procedure; "The scheme of Section 295 is rather to enable the Judge as matter of administration to destribute the price according to what seem at the time to be the rights of parties without this distribution importing a conclusive adjudication on those rights, which may be subsequently re-adjusted by a suit such as the present. Their Lordships approve of the decision on this point in *Vishnu*

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[1] (1884) I. L. R. 11 Cal. 42.

[2] (1901) I. L. R. 23 All 313.

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Bhikaji Phadke v. *Achut Jagannath Ghate* [1] and they concur in the further observation made by the learned Judge in that case that the application of the 13th article is also precluded by the fact that the order for distribution was a step in an execution proceeding, and was therefore made in the suit in which the decree was made which was in process of execution. The order for distribution was thus an order in a suit.'' A Court cannot in execution go behind the decree which it is executing. If the orders passed under Section 73 are made in execution of the several decrees which happen to be before the Court it is difficult to see how the Court has authority to question the validity of any of them. The action of a Court under Section 73 is materially different from that of a Court in insolvency proceedings. The estate is not vested in the Court. The remedies open to the creditors in future are not curtailed. The Court merely gives effect to a rule of procedure enacted for the purposes set out in the judgment of Strachey, C. J., in *Bithal Das* v. *Nand Kishore* [2]. The decisions cited for the respondents do not help the determination of the point in issue. They however rely upon general principles as establishing their title to the relief now sought. They contend that the judgment in O. S. No. 26 of 1910 is not one binding against all the world, that the existence of the debt sued upon is not *res judicata* as far as they are concerned and that the position they hold as judgment-creditors of the defendants in the suit entitles them to question the validity of the transaction. The judgment is not one *in rem*, the facts found are not *res-judicata* and the plaintiffs have now an interest in disputing the 1st defendant's right to receive payment. The answer furnished on behalf of the appellant is that there are exceptions to the rule that judgments *in personam* bind only parties and privies and that the present case falls within those exceptions. The existence of exceptions is recognised and acted upon in *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar* [3]. In that judgment a long passage is quoted with approval from an American Case, *Candee* v. *Lord* as giving a clear instance of such an exception. The passage in question contains the whole of the argument for the appellant. The proposition enunciated is this. An owner may dispose of or burden his property as he pleases provided he does not thereby cause injury to others. He may for instance contract a debt and this is a matter which concerns solely himself and the particular creditor, provided the act is not done in bad faith and to the prejudice of other creditors. When bad faith has been shown, the transaction can be avoided. When the proviso has been complied with strangers cannot intervene. They are not entitled to question the way in which a man has dealt with his own, merely because he has been improvident in incurring liabilities or careless in defending his rights. As regards judgments the conclusion is thus stated (page 486). "It follows from the principle suggested that a judgment obtained without fraud or collusion and which concludes the debtor, whether rendered upon default, confession, or after contestation is upon all questions affecting the title to his property conclusive evidence against creditors to establish first the relation of creditor and debtor between the parties to the record; and second the amount of the indebtedness." No Indian or English decisions covering the same ground have been cited before us. Black on Judgments, Volume 1, S. 294, Bigelow on Estoppel at page 167 and Bigelow on Fraud at page 91 indicate that the view taken in *Candee* v. *Lord* [1] is one generally accepted by American authorities.

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[1] (1890) I. L. R. 15 Bom. 438, [2] (1900) I. L. R. 23 All. 106 at p. 110.
[3] (1910) I. L. R. 33 M. 483.

An act of a debtor or a judgment passed against him may subsequently become highly detrimental to the interests of other creditors but this will not entitle them to interfere if all was done in good faith at the time the events took place. (*Vide* Bigelow on Fraud *loc cit*).

An illustration of the application of these principles is to be found in *Suppa Bhatter* v. *Suppa Sokkaya Bhattar* [2]. X had been the sole owner of certain property. Y claimed it under an alienation by X. Y's claim was upheld in a judgment passed in litigation to which all persons having an existing interest in disputing the claim were parties. Subsequently Z who had not been a party to the previous suit acquired such an interest and tried to question Y's rights on grounds similar to those which had failed before. It was held that he was not entitled so to do.

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[1] 51 Am. Dec. 294.

[2] (1915) 29 M L. J. 558.

I think the principle of the decision to be that the persons who had the exclusive right to settle the question had done so without any fraud on Z and he could not object to what had taken place.

The passages relied upon in the books referred to above lay stress on the fact that a fraud practiced on the debtor is not in itself any ground for interference by third parties. The defendant holds a decree which finally determines that the relation of creditor and debtor exists between him and his judgment-debtors and which is also conclusive as to the amount of the debt as between the parties. Fraud there has been but not of a nature to enable the debtors to re-open the matter. The plaintiffs are now seeking to have the debtors' lost cause re-tried because the result is injurious to themselves. They have failed to establish collusion or fraud against themselves. In these circumstances I think the principal of the decision above referred to applies and the plaintiffs are not entitled to attack the decree by showing that it is not based on real debt.

I am therefore of opinion that the appeal must be allowed and the suit dismissed. I agree with the order as to costs proposed by my learned brother.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.:—The 1st defendant is the appellant. The plaintiffs and the defendants 2 and 3 (who have common interests with the plaintiffs) are the respondents. The material facts and pleadings have been mentioned in detail in the judgment just now pronounced by my learned brother and I shall not repeat them.

I substantially agree with his conclusions throughout and have not much to say in my own words.

The decree attacked in the plaint, namely, the decree in O. S. No. 26 of 1910 was obtained by the 1st defendant against Nataraja Aiyar *ex-parte* and the assets held by the Court were realised in execution against his properties alone as the other judgment-debtor's (Lakshmana Chetty's) properties had vested in the Official Receiver on his insolvency.

That decree is dated 16th April 1910. The plaintiffs in the present suit state in paragraph 7 of the plaint " Nataraja Aiyar neglected to appear and the pleader engaged by him did not also appear on the date of hearing and by reason of the gross and culpable neglect of the said Nataraja Aiyar and by the defendant getting untrue and false returns " (the 1st defendant in this suit who was impleaded at first as the only defendant being the plaintiff and the decree-holder in the other suit) "and by the said defendant falsely swearing that the debt was due, the decree has been obtained. The same is fraudulent, null and void and collusive and is devoid of legal effect as against the plaintiffs. The subsequent proceedings initiated by Nataraja Aiyar to set aside the *ex parte* decree were fraudulently and collusively conducted by him. He fraudulently abstained from letting in all the evidence which could have been availed of by him. But in any case the said decree is not binding on the plaintiff."

Two of the eminent leaders of the bar of this Court, Messrs. T. R. Ramachandra Aiyar and K. Sreenivasa Aiyangar appeared for the contesting parties, (namely, Nataraja Aiyar and the present 1st defendant) respectively in the proceedings conducted to set aside the *ex parte* decree and they have been examined as defence witnesses Nos. 2 and 1 in this case. As the learned Subordinate Judge remarks in paragraph 43 of his judgment, " After reading their evidence it is not possible to find that there can be any collusion between Nataraja Aiyar and the 1st defendant in the conduct of those proceedings" (See also *Venkatarama Aiyar* v. *Nataraja Aiyar* [1] which contains the report of those hotly contested proceedings between Nataraja Aiyar and the 1st defendant and in which Nataraja Aiyar was unsuccessful).

That a judgment though obtained on perjured evidence is conclusive between the parties has been now settled by the Full Bench decision in *Kadirvelu Nainar* v. *Kuppusami Naiker* [2].

It is clear from the principle of the decisions in *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar* [3] and in *Ramamurti Dhora* v. *Secretary of State for India in Council* [4] which principle was substantially approved in *Suppu Bhattar* v. *Suppu Sokkayya Bhattar* [1] that when the relationship of decree-holder and judgment-debtor was finally established between the present 1st defendant and Nataraja Aiyar by the decree in O. S. No. 26 of 1910, the extent and reality of Nataraja Aiyar's indebtedness under that decree cannot be questioned by third persons (though they are also creditors of Nataraja Aiyar) so long as that decree remains effective. As regards proceedings in insolvency and bankruptcy and proceedings taken in winding up registered companies, special powers are given to Courts and Receivers, (not *to set aside* judgments and decrees, but as said in some English cases) "to get round judgments" "to go behind judgments" so that the creditors who have got just debts alone may share in the distribution of assets and not the creditors whose debts are unjust though they may be decree-creditors. Those decisions are, in my opinion, not applicable to the question of rateable distribution in execution proceedings under the Civil Procedure Code. Most Insolvency and Bankruptcy Acts, for instance, contain special provisions which direct that domestic servants and clerks, etc., should be paid in full the arrears of wages due to them for particular periods of time, in preference to other creditors and contain similar special provisions based on special considerations but these considerations cannot be taken into account under the Civil Procedure Code.

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[1] (1913) 24 M. L. J. 235.

[2] (1918) I. L. R. 41 Mad. 743.

[3] (1910) I. L. R. 33 Mad. 483.

[4] (1911) I. L. R. 36 Mad. 141.

I am therefore clear that the plaintiffs who are decree-holders (just like the 1st defendant) against Nataraja Aiyar cannot attack the 1st defendant's decree as not creating a valid debt against Nataraja Aiyar and as therefore not being a decree capable of execution against Nataraja Aiyar's assets, if Nataraja Aiyar himself is precluded from setting aside that decree and if there was no collusion between the 1st defendant and Nataraja Aiyar in the obtaining of the decree by the 1st defendant. Of course if there was such collusion, it was open to the plaintiffs to attack it. See *Suryanarayan Jagapati Raju* v. *Gopala Surya Rao* [2].

In the above view, it is unnecessary to consider the question whether the plaintiffs have a right to sue for a declaration and injunction and whether their only course was to have waited

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1. (1915) 29 M. L. J. 558, at 563. 2. (1912) 23 M. L. J. 699.

till the money was paid in the course of rateable distribution to the 1st defendant and then to bring their suit or suits for recovery of that money under the provisions of S. 73, Civil Procedure Code. I might however for the sake of completeness express my considered view that they are not so precluded. It may happen that the remedy under S. 73, Civil Procedure Code may become, in certain cases, quite illusory; for example, where the creditor to whom it was wrongly paid is a pauper or has no tangible property or absconds. The right of a man to recover the debt out of his debtor's assets is a substantial right. Where that right is in danger, I do not see why he should be confined to a particular remedy given by a particular statute and why he should not resort to another remedy given by another statute (such as the Specific Relief Act) to protect his rights effectively. If there are observations in certain cases which hold that a suit for declaration and injunction (where the plaintiff is entitled to sue under Section 73 after the wrong distribution takes place) is premature, I respectfully dissent from those observations. The actual decision in *Parasurama Pattar* v. *Veeraraghava Pattar* [1] can be supported on the ground that the consequential relief of injunction was not asked for. Exhibit I merely follows *Parasurama Pattar* v. *Veeraraghava Pattar* [1] and the actual decision may be supported on the same ground.

In the result, though with great reluctance, I agree with my learned brother in holding that the lower Court's decision must be reversed and the suit dismissed but as the 1st defendant obtained a dishonest decree and raised the false defence that the promissory note on which he obtained that decree in O. S. No. 26 of 1910 was supported by consideration, I would direct the parties to bear their respective costs in both Courts.

A. V. V.

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[1] (1897) 7 M. L. J. 277.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE MOORE.

Garapathi Brahmayya and others ... *Appellants* * (*Defendants,*)

v.

Kurella Ramiah ... *Respondents* (*Plaintiff.*)

Garapathi Brahmayya *v.* Kurella Ramiah.

Contract Act, S. 23—Abkari licence—Licensee entering into partnership with stranger in contravention of the terms of the licence—Legality of the partnership—Rights of creditor lending moneys to the partnership—Knowledge of illegality—Onus of proof—Liability of licensee—Extent of—Presumption.

Where a person who has obtained a licence from the Government to sell arrack, takes a partner in the business without the previous permission of the Collector as required by the terms of the license the partnership is illegal.

Nalam Padmanabham v. *Sait Badri Nath Sardar* [1]. *Thithi Pakurudasu.* v. *Bheemudu* [2]. *Maruda Muthu Pillai* v. *Rangasami Moopan* [3] Relied on.

Where the carrying on of a business which is *prima facie* legal becomes *malum prohibitum* under certain circumstances, the burden of proving that a third party was aware of the prohibition lies on the person asserting the existence of such knowledge.

Where however a creditor lends money to an abkari partnership with full knowledge of the terms of the license under which the business was carried on, the burden is on him to show that the conditions of the license were complied with and that the partnership was legal If the creditor fails to discharge the burden he cannot recover his debt from the illegal partnership. The licensee, however, is liable to repay the creditor, at least in cases where the latter is not a *particeps criminis.* In the absence of anything to show to what extent the licensee was benefitted by the loan advanced to the illegal partnership consisting of himself and another, the presumption is that he was benefitted by half and he would be liable to re-pay that sum to the creditor.

Second Appeal against the decree of the Court of Temporary Subordinate Judge of Ellore in A. S. No. 206 of 1917, preferred against the decree of the Court of the District Munsif of Ellore in O. S. 550 of 1915.

P. Narayanamurti, for Appellant.

A. Krishnaswami Iyer and *P. Somasundaram,* for Respondent.

The Court delivered the following

Judgment.—The main facts of the case are not in dispute. The first defendant obtained a license to sell arrack. The principal condition in it with which this second Appeal is concerned is in these terms,—" Para 16. The privilege of supply

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* S. A. No. 1590 of 1918. 4th August, 1919.

[1] (1912) I. L. R. 35 M. 582

[2] (1903) I. L. R. 26 M. 430.

[3] (1901) I. L. R. 24 M. 401.

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and vend shall not, without the permission of the Collector previously obtained, be sold, exchanged or sub-leased, nor, if the Collector has ordered, can an agent be appointed, without his permission first previously obtained, for exercise of any such privilege." The first defendant took the second defendant as his partner without obtaining the Collector's sanction. Plaintiff had dealings with both the defendants and the suit is for money due on those dealings.

The first question is whether the partnership became illegal by the second defendant joining the business. Mr. A. Krishnaswami Aiyar, Vakil for the respondent argued that as the license does not in terms prohibit a partnership and as the word 'transfer' is not to be found in it, the transaction was not illegal. He relied on *Karsan* v. *Gatlu Shivaji* [1] and on *Natla Bapiraju* v. *Puran Achutharajajee* [2]. In the latter case the learned Judges based their decision on the fact that the license was not before them. In *Karsan* v. *Gatlu Shivajee* [1] the learned Judges say that the omission of certain words in the new license issued by the Government of Bombay indicated a change of intention on the part of the executive not to treat partnership as illegal. We are not in a position to gather the intention of the Madras Government on this subject. We must therefore give to the language of the clause in the license its ordinary meaning. The clause prohibits a sale by a stranger and the employment of an agent. In our opinion the taking of a partner has the effect ordinarily of selling a portion of the business to him. It has certainly the effect of making him an agent for the sale of liquor. As these are prohibited, we think that the partnership is illegal. *Nalam Padhmanabham* v. *Sait Badri Nath Sirdar* [3], *Thithi Pakurudasu* v. *Bheemudu* [4] and *Maruda Muthu Pillai* v. *Rangaswami Moopan* [5] have consistently adopted this view in this Court.

The next question is whether the plaintiff had notice of the illegality of the partnership. Mr. Krishnaswami Aiyar relied on the observation of Bowen, L. J., in *Hire Purchase Furnishing Company* v. *Richens* [6] for this purpose. The learned Lord Justice had before him a case which would be governed in this

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1. (1913) I. L. R. 37 Bom. 320.
2. (1910) M. W. N. 549.
3. (1912) I. L. R. 35 Mad. 582.
4. (1903) I. L. R. 26 Mad. 430.
5. (1901) I. L. R. 24 Mad. 401.
6. (1887) 20 Q. B. D 387.

country by S. 263 of the Contract Act. It was held that where the carrying on of the business which is *prima facie* legal becomes *malum prohibitum* under certain circumstances, the burden of proving that the prohibition was known to the lessor was on him. *Waugh* v. *Morris* [1] is also to the same effect. But these decisions do not affect the present case. As admitted by the plaintiff in his plaint, he knew that the first defendant alone had the license ; he knew that the 2nd defendant was taken as a partner and that the partner carried on the business. Under these circumstances it was incumbent upon him to have made enquiries as to whether the Collector permitted the 2nd defendant to join in the business. The burden was on him and we must hold that he has failed to discharge it. We must take it that the plaintiff had knowledge of the illegality of the contract.

Now comes the third question which was argued with great insistence by Mr. Narayanamoorthy, Vakil for the appellants. The question is whether, if the transaction is illegal by virtue of the fact that an unauthorised person was included in it, the plaintiff can have no cause of action for dealings he carried on even against the first defendant. It is not denied that the first defendant could have legitimately carried on the business. Nor is it denied that if the plaintiff lent to the first defendant he could have recovered. Does he lose his rights altogether because the second defendant has joined in it ? In other words where the transaction is not *malum in se* but *malum prohibitum* to a certain extent, is a third party to have no relief ? We adopt the statement of law contained in Lindley on Partnership page 127.* It is in these terms : "The illegality of a partnership affords no reason why it should not be sued. It cannot indeed be effectually sued by any person who, being aware of all the facts, seeks to enforce a demand arising out of a transaction tainted with the illegality which affects the firm; but the illegality of the firm does not *per se* afford any answer to a demand against it, arising out of a transaction to which it is a party, and which transaction is legal in itself. Unless the person dealing with the firm is *particeps criminis*, there can be no *turpis causa* to bring him within the operation of the rule *ex*

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[1] (1873) L. R. 8 Q. B. cases 202.

Garapathi Brahmayya v. Kurella Ramiah.

turpi causa non oritur actio; and he, not being implicated in any illegal act himself cannot be prejudiced by the fact that the persons with whom he has been dealing are illegally associated in partnership." The cases to which Mr. Narayanamoorthi drew our attention, notably *Bani Muncharam* v. *Regina Stanger* [1] are cases of transactions being unusual or illegal in themselves. In such cases the person who deals with the defendant is believed to have been *particeps criminis* and as such not entitled to recover anything. See also *Upfill* v. *Wright* [2]. But where there is nothing illegal or opposed to public policy in the business itself and there is nothing which touches the conscience of the lender, these decisions have no application. It was a perfectly legal business which by the inclusion of the 2nd defendant became inoperative as a partnership. The last question is whether the plaintiff is entitled to recover the whole amount. Mr. A. Krishnaswami Aiyar relied on *Jamna Bai* v. *Vasanta Rao* [3] for the position that the first defendant should pay the whole amount. That was a case of a void contract. Here the question is to what extent was the first defendant alone benefitted. S. 45 does not help us in such a case. We think the presumption is that he was benefitted by half the loan. In modification of the decree of the Courts below, we give the plaintiff a decree for half the amount sued for with costs against the first defendant. The second defendant will bear his own costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE KRISHNAN.

Tangutur Narasimham ... *Appellant* * *(1st Defendant).*

v.

Singaraju Ramiah and others. ... *Respondents. (Plff. 2nd Deft. and Legal Representative of the 3rd Defendant.)*

Tangutar Narasimham v. Singaraju Ramiah.

Madras Proprietary Estates-Village Service Act (II of 1894)—S. 15 cls 1 & 3—New Office created under cl. (1)—Nomination by proprietor—Validity—Conditions

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* S. A. No. 1791 of 1918. 26th September, 1919.

[1] (1908) I. L. R. 32 Bom. 581.

[2] (1911) 1 K. B. 506.

[3] (1916) I. L. R. 39 Mad. 409. P. C.

Tangutur Narasimham v. Singaraju Ramiah.

—Limitation—Starting point of 6 weeks allowed by cl. (3)—Delegation of power of nomination—Validity—Nomination made by proprietor but report signed by agent —Effect—Nomination in anticipation of creation of office—Validity—Withdrawal of nomination—Permissibility—Effect.

In the case of the creation of a new office under S. 15 cl. (1) of Madras Act II of 1894, the starting point for the six weeks within which the proprietor has to submit the report referred to in that clause is the day on which all the requisite steps have been completed under S. 6 of the Act, or, in other words, the day on which the last step was completed.

The power of the choice of a new officer given to the proprietor under S.15 cannot be delegated by him. But where the choice has been made by the proprietor himself, there is nothing to prevent an agent from acting for the proprietor in formally embodying the nomination in the form prescribed for it and signing it for him and submitting it.

A proprietor may submit his nomination in advance in anticipation of a new office being created; such a submission if received and kept on the file and not rejected by the authorities will take effect when the office is created and the time for appointment comes.

Semble the proprietor may withdraw a nomination made prematurely and substitute a new nominee. Such a power to withdraw may exist even with reference to a nomination made after the creation of the office till the nominee is accepted and appointed by the Divisional Officer.

Where a proprietor duly submitted a nomination to a new office as required by S. 15 cl. (1) and subsequently submitted a fresh nomination referring to the prior nomination and confirming it only because he was made to understand that the prior submission was not properly signed, while, in fact, it was, *held* that the first nomination being otherwise valid, the subsequent nomination would not, in the circumstances of the case, affect its validity.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Nellore in Appeal Suit No. 5 of 1918. preferred against the decree of the Court of the District Munsif of Kavali in Original Suit No. 793 of 1915.

A. Krishnaswami Aiyar, for Appellant.

T. V. Venkatarama Aiyar and *P. Narayanamurthi*, for Respondents.

The Court delivered the following

Judgment :—Plaintiff sues to declare that he is the properly appointed Karnam of Vinjamur under the Madras Proprietary Estates Village Service Act, Act II of 1894, and that the appointment of the 1st defendant to that office is *ultra vires* and invalid.

This is a case to which S. 15 of Act II of 1894 applies. Plaintiff was appointed by the Deputy Collector of Atmakur acting under cl. (3) of that Section. Unless that appointment can be held to be a valid one, plaintiff's suit must fail, and, it will be unnecessary to consider whether the order of the District

Collector setting aside that appointment and appointing the 1st defendant instead which was confirmed by the Revenue Board, was *ultra vires* or not. The burden is on the plaintiff to establish the validity of his appointment in this case.

The Deputy Collector could act and make his own nomination under clause (3) only if the proprietor failed to submit his nomination to his office within a period of six weeks from the creation of the new office if clause (1) applied or from the date of the Collector's notice under clause (2) if that clause applied.

It is contended for the 1st defendant appellant that there was a proper submission of his name within time, made by the proprietors and that it was therefore not open to the Deputy Collector to appoint his own nominee.

The procedure for the creation of a new office is laid down in S. 6 of the Act. After the necessary preliminary steps are taken and the Board's sanction is obtained the section directs that a notification about the grouping of the Villages in connection with the creation of the new office shall be published in the District Gazette as well as in the Village in question and a copy of it given to the proprietor. We are of opinion that in the case of the creation of a new office under S. 15 cl. (1) the starting point for the six weeks will be the day on which all the requisite steps have been completed under S. 6 or in other words the day on which the last step was completed.

Having decided the starting point generally, we must see whether there was in this case a valid submission, within the requisite period of a name for the office by the proprietors. The 1st defendant relies on Ex. X as the proper submission for the purpose. It is dated 9—10—14 and it recites that notice was given to the proprietors on 15—9—14, that is, within six weeks prior to its date. It is not signed by the proprietors but it purports to have been made by them and is signed by a person as their "agent and power of attorney holder". The 1st defendant is nominated in it for the office of the Karnam of Vinjamur.

Several objections have been taken to its validity which we have to consider. To understand them fully, it is necessary further to mention that the notice recited in Ex. X was sent to the proprietors by the Tahsildar of Udayagiri apparently under the orders of the Deputy Collector. The District Collector sent again to the proprietors what is described as "a formal notice" on 7-11-14; these notices are not now produced. After the receipt of the 2nd notice the proprietors sent another nomination Ex. XI signed by one of them wherein they again nominated the 1st defendant and in doing so referred to their previous nomination of him which their agent had submitted under their orders given to him by telegram Ex. V and letter Ex. IV.

Ex. X was treated as "of no value" by the Deputy Collector as, according to him, "the proprietors' agent had no power to send such nominations or this office to give such notice of the changes in the village offices" and he refers to S. 1 of Act IV of 1900 and S. 15 (2) of Act II of 1894 as his authority. It may at once be observed that Section 1 of Act IV of 1900 was in effect repealed by S. 2 of the Madras Limited Proprietors Act, Act IV of 1911. Even otherwise S. 1 would have had no bearing on the present case. Evidence makes it quite clear in this case that the choice in favour of the 1st defendant was really exercised by the proprietors and not by the agent. See Ex. IV and V and the recital in Ex. XI. It is a general principle of law that what can be done by a person can be done for him by a duly authorised agent unless there is an express or implied prohibition against it. As the power of the choice of the new officer is given to the proprietor under S. 15 of Act II of 1894 and he has to exercise his own choice there is an implied prohibition against his delegating that power. But we have not been referred to any section or rule or any other consideration preventing an agent from acting for the proprietors in formally embodying their nomination in the form prescribed for it and signing it for them and submitting it. If the Deputy Collector had any doubt of the agent's power to act on the principal's behalf, he should have called for proof; but we think he was not right in rejecting Ex. X on the ground that it was not signed by the proprietors. It was further argued that as the proprietors themselves had treated Ex. X as invalid and submitted a fresh nomination by Ex. XI, the former cannot be relied upon any more. But in Ex. XI the proprietors refer to Ex. X and confirm their first nomination and only purport to send Ex. XI because they were made to understand that Ex. X was not properly signed. If Ex. X were otherwise valid we think Ex. XI cannot be taken as affecting its validity.

The next objection to Ex. X is that it was sent in reply to an invalid notice, as it is argued that the notice sent in September was not a valid one because it was sent by the Tahsildar and not by the Deputy Collector. The notice issued by the Tahsildar is not before us ; and we are not satisfied that it was an improper notice, which presumably it was not, being an official Act. But even if it was an unauthorised notice we do not think it will materially affect the case. Taking the notice of the Collector of the 7th November as the proper notice, it would merely follow that the nomination under Ex. X was submitted a little too soon. So far as we see there is nothing to prevent a proprietor submitting his nomination in advance in anticipation of a new office being created ; such a submission if received and kept on the file and not rejected by the authorities would take effect when the office is created and the time for appointment comes. S. 15 (3) provides for the latest date by which the submission should be made. It may be open to the proprietors to withdraw a nomination made prematurely and substitute a new nominee but they did not do so in the present case. Such a power to withdraw may exist even with reference to a nomination made after the creation of the office till the nominee is accepted and appointed by the Divisional Officer. The power to withdraw therefore does not in any way affect the validity of a nomination made. The argument that Ex. X was premature is thus of no force. It is not suggested that there was any starting point for the six weeks earlier than the Tahsildar's notice.

We think therefore that Ex. X was a proper nomination of the 1st defendant, and is sufficient compliance with the law and was within the time and it should have been accepted and acted upon by the Deputy Collector in the circumstances of this case. His nomination of the plaintiff to the Karnam office was therefore *ultra vires* and plaintiff's suit based on it must fail.

Second Appeal is therefore allowed and the decrees of the lower courts reversed and the plaintiff's suit dismissed with costs throughout.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE MOORE.

P. Murugappa Mudaliar (dead) and others. ... *Appellants* * (*2nd and 3rd Defendants and L. R. of the 2nd Defendant*).

v

Minor Munusami Mudali and others ... *Respondents* (*Plaintiffs 2, 3 and 4 and 1st Defendant.*)

Murugappa Mudaliar
v.
Munusami Mudali.

Contract Act—Ss. 134, 139. *Applicability — Promissory note — Suit against maker and sureties—Withdrawal of claim against maker during trial—Effect—Plaintiff's right against sureties—English law—Applicability.*

During the trial of a suit on a promissory note brought against the maker and two sureties, the plaintiff withdrew his claim against the maker, the principal debtor. *Held* (1) that there was a reservation of plaintiff's right to proceed against the sureties, and (2) that the release of the principal debtor during the trial of the suit did not destroy plaintiff's right to proceed against the sureties.

The principle of the English law that the discharge of the principal debtor will not affect the right of suit against the sureties where there is a reservation to proceed against them is applicable in India.

Bateson v. *Gosling* [1] appld.

Natesa Aiyar v. *Appavu Padayachi* [2] refd. to.

Ss. 134 & 139 of the Contract Act are applicable to negotiable instruments.

Second Appeal against the decree of the District Court of Chingleput in Appeal Suit No. 3 of 1916 preferred against the decree of the Court of the Additional District Munsif of Chingleput in Original Suit No. 39 of 1914 (O.S. No. 47 of 1913 on the file of the Court of the District Munsif of Conjeevaram.)

S. Subramania Aiyar and *S. Ramachandra Aiyar,* for Appellant.

T. M. Krishnaswami Aiyar, T.M. Vedantam and *Visvanatha Aiyar,* for Respondent.

The Court delivered the following

Judgment :—The suit was brought on a promissory note executed by a deceased agent of 1st defendant to the 3rd defendant. The latter endorsed it to the plaintiff. The 2nd defendant executed an agreement Ex. B at the time of the endorsement of the note undertaking to be liable for the amount of the note. The suit was against all the three defendants on the note. In the course of the suit plaintiff withdrew his claim against 1st defendant. Thereupon a decree was passed against the other two defendants. This appeal is against that decree.

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* S. A. No. 1066 of 1917. 30th September 1919.

[1] (1871) L. R. 7 C. P. 9. [2] (1913) I. L. R. 38 M. 178=24 M. L. J. 488.

Mr. Krishnaswamy Ayyangar in his learned argument contended before us that as the principal debtor, the 1st defendant has been exonerated, the other two defendants are also discharged from liability, and that there should be no decree against them. He relied upon the language of Section 134 of the Indian Contract Act. We may say at once that we do not agree with the Lower Appellate Court that Sections 134 and 139 of the Indian Contract Act do not apply to negotiable instruments. The general law regulating the relationship between principal and surety is contained in the Contract Act, and would apply to all cases of contracts. Therefore we do not base our decision upon the view taken by the District Judge that the Indian Contract Act has no application to suits of this description. The real question is whether the release of the 1st defendant during the trial of the suit destroys the right of the plaintiffs to proceed against defendants 2 and 3. There is no doubt that under the English law the discharge of the principal debtor where there is a reservation to proceed against the sureties would not affect the right of suit against the sureties. That has been laid down by that eminent Judge Willes, J. in *Bateson* v. *Gosling* [1]. He says after examining the earlier authorities : "It must, therefore, now be taken to be settled that, where the principal has entered into a deed of arrangement containing a release subject to the reservation of the creditor's right of recourse against the surety, the latter has no right to raise the objection. If, however, there is an absolute and unconditional release, the remedy against the surety is gone, because the debt is extinguished. The reason that the surety cannot in such a case be sued is, that it would be a fraud upon the rest of the creditors as is pointed out in *Lewis* v. *Jones* [2] where there is a note of Mr. Cresswell which has sometimes been erroneously attributed to Holroyd, J., in which the matter is very fully considered." Two points have been raised with reference to this judgment. One is that there is no reservation in this case. We are unable to agree with the learned Vakil on this point, because where a

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1. (1871) L. R. 7 Common Pleas 9. 2. (1825) 4 B. & C. 506.

suit is brought against three persons and it is withdrawn against one, there cannot be a more express reservation of the plaintiff's intention to prosecute his remedies against the other two. Therefore we must hold that there has been a reservation of the right to proceed against the two sureties. The other point is whether this principle of English law can be introduced into Section 134 of the Contract Act. The learned Vakil contended that there is nothing in the language of Section 134 which would warrant the introduction of the principle of reservation enunciated in *Bateson* v. *Gosling* [1]. The principle of applying English law to the provisions of the Indian Contract Act was considered by Sir Arnold White in *Natesa Aiyar* v. *Appavu Padayachi* [1]. The learned Chief Justice there says with reference to the question whether a deposit can be recovered back when the contract has fallen through ; "I agree that the question must be determined with reference to the provisions of the Indian Contract Act and that if they are in conflict with the English law as laid down in the English authorities we must follow the statute. I think, however, it may safely be premised that in a question such as this it was not the intention of the legislature to depart from what was understood to be the English law at the time the Indian Contract Act was passed." Miller, J., uses similar language. Wallis, J., as he then was, who differed from Sankaran Nair, J., is equally clear upon this question. Therefore in considering the Indian Contract Act, we have to see that was the state of the law when the section was enacted. If we ascertain the state of English law and if we find that the Indian law does not in terms depart from the rule of English law according to the principle laid down by the learned Chief Justice, we would be justified in saying that the Indian law carries out the rule as enunciated by eminent Judges in England. Applying that principle, we must hold that the law which Willes, J., regarded as well settled in England just before the passing of the Contract Act must be taken to have been in the mind of the legislature in enacting Section 134 of the Indian Contract Act. Therefore we have come to the conclusion that there has been a reservation of right as against the sureties ; and

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[1] (1913) I. L. R. 38 Mad. 178.

Murugâppa Mudaliar v. Munusami Mudali.

as there is nothing in the terms of Section 134 of the Indian Contract Act which is inconsistent with the rule of law as understood in England, we must hold that the remedy against the sureties is not affected. Moreover, on principle it seems to us that the same conclusion is deducible. As was pointed out by Kelly, C. B., in *Cragoe* v. *Jones* [1] the rule why a surety is held to be discharged from liability where there is a release of the principal debtors is "If the creditor without the consent of the surety by his own act destroy the debt, or derogate from the power which the law confers upon the surety to recover it against the debtor in case he shall have paid it to the creditor, the surety is discharged." Consequently so long as there is the possibility of the surety having recourse to the principal debtor for payment or for contribution the debt itself is not extinguished and the right to proceed against the surety is not affected. This must be taken to have been the principle which underlies the decision in *Nathabhai Tricamlal* v. *Ranchhodlal Ramji* [2] and *Shaik Ali* v. *Mahomed* [3] although no doubt, in those cases, the creditor gave up his remedy against the principal debtor because he could not be served.

Mr. Krishnasami Ayyangar drew our attention to Order IX Rule 5 which gave a right of suit against a person exonerated if the plaintiff is able to bring a suit within the time allowed by law. But that could not affect the principle which underlies the decisions in the two Bombay cases. The mere giving up of a right in court against a principal debtor would not affect the right of the plaintiff to obtain a decree against persons against whom he reserved the right. Further, the principle of English law is recognised in Section 39 of the Negotiable Instruments Act. It follows *a fortiori* that that principle which reserves to the plaintiff the right to proceed against the surety while giving up his right against the principal debtor is applicable to the present case.

We do not agree with the Vakil for the respondent that this is a case for the court exonerating the defendant and not the party himself exonerating him. The Court is not in any way interested in refusing to give a decree against one party

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[1] (1873) L. R. Exch. 81.

[2] (1914) I. L. R. 39 Bombay 52.

[3] (1889) I. L. R. 14 Bombay, 267.

Murugappa Mudaliar v. Munusami Mudali.

and in insisting upon the plaintiff obtaining a decree against the other party. We must take it that there was an exoneration by the plaintiff himself of the principal debtor. We are of opinion that the decision of the lower court is right and we must dismiss the appeal. We make no order as to the costs of the 1st defendant. As regards other respondents there will be one set of costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE MOORE.

The Tanjore Life Assurance Co., Ltd., having its registered office at Tanjore Fort by R. Sivarama Aiyar Vakil, Tanjore. Liquidator of the said Company ... *Appellant* * *(Defendant).*

v.

Kuppanna Rao ... *Respondent (Plaintiff.)*

The Tanjore Life Assurance Co., Ltd. v. Kuppanna Rao.

Life Insurance Policy—Rights of policy holder—Suit for refund of premia paid—Maintainability—Conditions—Resolution of company affecting previously acquired rights of policy-holder—Validity—Effect.

Plaintiff's mother took out a policy in the Tanjore Life Assurance Company on 22-5-1906 which provided that if the assured paid the future premium at one rupee per mensem until 20th May 1921 or till her death the company would be liable to pay her or her assignee (the plaintiff) such sum as shall become due and payable by virtue of the rules contained on the back thereof agreeable to the regulation of the Company on the completion of 15 years premium or on satisfaction of proof of death and title of the assured. Under the rules of the company then in force, policy-holders had the option of discontinuing the payment of the monthly premiums after they had paid for 60 months. Plaintiff's mother paid the premia for 61 months, that is, till May 1911 but made no further payments and died on 6-4-1914. In a suit brought by plaintiff for, *inter alia*, a refund of the premiums paid by his mother, the Assurance Company contended that plaintiff was not entitled to a refund because the policy had lapsed owing to the non-payment of the premiums and relied upon a resolution passed at an extraordinary meeting of the shareholders of the company in or about January 1911 to the effect that the premia should be continued to be paid till the death of the assured. No notice was given to plaintiff's mother about this extra ordinary meeting, and she did not take out the policy subject to the rules then existing *as well as to the rules which might be framed or altered otherwise. Held,* overruling the contention of the Assurance Company, that the rule relied upon by it was not binding on plaintiff's mother and could not affect the rights acquired by her under the policy before the said rule was passed and that plaintiff was therefore entitled to a refund of the premia paid.

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* S. A. No. 2096 of 1918. 5th September, 1919.

The Tanjore Life Assurance Co., Ltd. v. Kuppanna Rao.

Second Appeal against the decree of the Court of the Additional Temporary Subordinate Judge of Tanjore in A. S. No. 79 of 1918 preferred against the decree of the Court of the District Munsif of Tanjore in O. S. No. 218 of 1917.

T. L. Venkatrama Aiyar, for Appellant.

T. K. Rangaswami, for Respondent.

The Court delivered the following

Seshagiri, Aiyar, J.

Judgments :—*Seshagiri Aiyar, J.*—Both the junior members of the bar who appeared in the case argued it very ably. The facts are not in dispute. A Policy was effected on the life of one Nagammal on the 29th May 1906. The premia were payable monthly. The assured made 61 payments, and then discontinued the payment. She died on the 6th April 1914 and the present suit was instituted on the 11th April 1917. The District Munsif dismissed the suit, In appeal the Subordinate Judge gave a decree for the amount of the premia paid by the deceased. I agree with the conclusion of the lower appellate Court though not for the reasons given by it.

When the insurance was effected the rule of the Company stood thus : (See Exhibit E clauses (b) and (c): " The Polciy-holders mentioned above who have been making payments duly in that manner will be paid interest at the rate of Rs. 6 per annum. It is only after the death of the Policy-holder that the life assurance amount will be determined. (c) If the present Policy-holders desire, they may pay the entire amount for 60 months and stop (paying) the monthly premium." It was under this last clause that Nagammal paid for 60 months and then stopped payments. That she was justified in discontinuing payment is too clear from two exhibits (c) and (c1) which were letters written by the Secretary of the Company to the assured. In these letters it is pointed out that as she has discontinued payments she is not entitled to interest. There is no suggestion that the policy has lapsed owing to the non-payment of the premium.

In or about January 1911, the share-holders held an extraordinary meeting at which they passed resolutions to the effect that the premia should be continued to be paid till the death of the assured. Rule 70 is : " Premiums shall be payable until the death of the Policy-holder." It is common ground that no notice was given to the assured about this extraordinary meeting. The contention on behalf of the company is that as under the new rules the premia ought to have been continued till the death of Nagammal, she forfeited her right even for the payment of the amount paid by her as the policy had lapsed by non-payment. The subordinate Judge has not discussed the real question for decision, apparently as the arguments in the court below were not directed to it. He has referred to S. 65 of the Contract Act and has held that as the contract has become void, the promisee is entitled to the refund of the moneys paid under it. There can be no doubt that if there has been failure to pay the stipulated premia the assured is not entitled to a refund of the sums actually paid. The principle is stated very succinctly in *Crawley's* book on Insurance as to when and under what circumstances the premium will be repaid. Roughly speaking in three classes of cases the assured can claim refund. Where there has been fraud on the part of the company in inducing the assured to insure in the company, or where the policy has become void *ab initio* or where no risk has been incurred by the insurer. Macgillivray quoted by Mr. Venkatrama Aiyar for the appellant states the law thus : "The general rule applicable to claims for the return of the premium is that if the insurers have never run the risk they have not earned the premium and are bound to return it, Thus, if a contract of insurance is set aside on the ground of misrepresentation or mistake or for some other reason the policy is held to have been void *ab initio*, or to have been avoided before the risk began to run, the assured is, in the absence of any express condition to the contrary, entitled to repayment of any premium which he may have paid *Bermon* v. *Woodbridge* [1], *Anderson* v. *Fitzgerald* [2] *Goldstein* v. *Salvation Army Assurance Society* [3], *Moses* v. *Pratt* [4], *Pritchard* v. *The Merchants Life Assurance Society* [5] all bear out this statement of the law.

The next question is when is the risk run by the company. In *Canning* v. *Farquhar* [6] it was stated that in the absence of a provision to the contrary the risk commences at the time when a binding contract of insurance is concluded. Applying this principle the risk commenced against the defendants' company on the execution of Exhibit A, the policy of insurance, on the 29th of May 1906 ; and if the assured is bound by the new rules passed by the company at its extraordinary meeting there can be no doubt on the principles of the decisions already quoted by me, the heirs of the assured will not be entitled to claim the return of the premium.

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[1] (1781) 2 Doughl. 781

[2] (1853) 4 H.L.C. 484 at page 508.

[3] (1917) 2 Q. B. 291 at page 296.

[4] (1816) 4 Campbell 297.

[5] (1858) 3 C.B. (N.S.) 622 : 140 E.R. 885.

[6] (1886) 16 Q. B. D. 727.

Now comes the question which has been raised by the learned Vakil for the respondent whether the new rules were binding upon Nagammal. The right principle is, that ordinarily, a concluded contract cannot be re-opened by one of the parties to it making a change in regard to the terms of the contract. That principle is well illustrated by *Allen* v. *Gold Reefs of West Africa, Ltd* and *Same* v. *Same* [1]. In page 663 Lord Justice Romer put this question to the counsel: "Can you alter Articles so as to affect past transactions ?" The answer was : "We do not propose to alter the relation of debtor and creditor". In the same judgment Lindley, M.R., says, at page 672 : "But then comes the question whether this can be done so as to impose a lien or restriction in respect of a debt contracted before and existing at the time when the articles are altered. Again speaking generally I am of opinion that the articles can be so altered, and that if they are altered *bona fide* for the benefit of the company, they will be valid and binding as altered on the existing holders of paid-up shares, whether such holders are indebted or not indebted to the company when the alteration is made. *But, it will be seen presently, it does not by any means follow that the altered article may not be inapplicable to some particular fully paid-up shareholder.* He may have special rights against the company, which do not invalidate the resolution to alter the articles, but which may exempt him from the operation of the articles so altered.".

And then at the end of page 673 the learned Lord Justice says "*A company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles and specially with contracts between a member of the company and the company respecting its shares, care must be*

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[1] (1900) I. Ch. 656.

The Tanjore Life Assurance Co., Ltd. v. Kuppanna Rao.

Seshagiri Aiyar, J.,

taken not to assume that the contract involves as one of its terms an article which is not to be altered." Vaughan Williams, L. J., who differed from the majority of the Bench says :—"A resolution may alter the regulations of a company but cannot retrospectively affect existing rights" Lord Justice Romer also said that if there was a concluded contract the company will not be justified in altering its terms by subsequent resolution. The case before the Court of Appeal was one affecting a shareholder. A share-holder would usually have no notice of the proposed change in the articles of association ; he would have an opportunity of contesting the proposal to change the rule. His case is therefore not in *pari materia* with that of a stranger who is a policy-holder and who is not given notice of meetings of the company. Therefore while the observations contained in this decision are certainly in favour of the view that a concluded contract should not be altered to the prejudice of the promisee by anything done behind his back and to which he had not submitted himself. The suggestion of the learned Vakil for the appellant that a policy-holder is as much bound as a shareholder by any change that may be made in the rules is not borne out by this judgment. He however relied upon the decision of the House of Lords in *British Equitable Assurance Company Limited* v. *Baily* [1]. That was undoubtedly a case of a policy-holder and the question there was whether he was affected by a new rule passed at an extraordinary meeting of the company. The reservations contained in the judgment of the Noble Lords support the view taken in *Allen* v. *Gold Reefs etc. Ltd* : *Same* v. *Same* [2]. In that case the facts were these : " The assured entered into a contract which contained these terms :—" I agree to conform to and a bide by the deed of settlement and bye-laws, rules and regulations of the company in all respects." Another provision to which he submitted was this : " I shall pay all such other sums, if any, as the company by their directors ordered to be added to such an amount by way of bonus or otherwise, acording to their practice for the time being. " What was done at the extraordinary meeting was to set apart a certain amount of the profits for a reserve fund. The assured contended that as the prospectus on the faith of which he assured his life did not provide for allocating portion of the profits to the reserve fund, the action of the company was not binding on him. Lord Macnaghten at the very outest of his judgment quotes these observations of Cozens Hardy, L. J.—"A company cannot by altering its articles justify a breach of contract" and then proceeds : "No one, I should think would be inclined to dispute the proposition thus asserted." The Noble Lord then refers to the fact that the assured had bound himself to abide by any changes that may be made by the company and then says : "It will be observed that the prospectus does not purport to give an assurance of any sort that the allocations of profits would never be altered." Finally he concludes : " I am at a loss to understand how the Court of Appeal came to the conclusion that the statements in this prospectus constituted a collateral contract or ought to be treated as incorporated in the contract of Insurance." Lord Robertson used similar language. Lord Lindley who took part in the decision in *Same* v. *Same* [1] says at the bottom of page 742:—" A bye-law to the effect that no creditor or policy-holder should be paid what was due to him would, in my opinion, be clearly void, as an illegal exercise of power." The Noble Lord like Lord Macnaghten points out that the prospectus on the faith of which the Policy-holder entered into the contract was not part of the contract and therefore as the assured had bound himself to abide by any changes that may be made regarding the distribution of profits he should not be heard to say that the company had no power to change its rules. Now applying these principles to the present case it is clear in the first place that Nagammal did not bind herself to abide by any other alterations that may be made by the company in future. Mr. Venkatarama Aiyar referred to this sentence in Exhibit A. " The company shall be subject and liable to pay .... to the assured or her assignee S. Kuppanna Row son or heirs or to whomsoever he assigns such sums that shall become due and payable by virtue of the rules contained on the back hereof agreeable to the regulations of the Company." That only related to the amount that may be found due. The assured did not submit herself to any changes that may be made by the company in its rule. Moreover the contract between Nagammal and the company had become concluded, and it was not open to the company to change any of its terms by its one-sided action. It seems to me therefore that the action of the Company so far as assurances which were completed before they passed new rules were concerned was *ultra vires* and could not bind the policy-holders. In this view in my opinion the decision of the Subordinate Judge is right and this appeal should be dismissed with costs.

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[1] (1906) A. C. page 35.

[2] (1900) 1 Ch. 656.

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[1] (1900) 1 Ch. 656.

Moore, J.,

Moore, J.—The facts in the case are simple and may be shortly stated. Plaintiff's mother took out a policy in the Tanjore Life Assurance Company on the 29th May 1906. The policy provided that if the assured paid the future premium at one rupee per mensem until 20th May 1921 or till her death the Company would be liable to pay her or her assignee (the plaintiff) such sum as shall become due and payable by virtue of the rules contained on the back hereof agreeable to the regulations of the Company on the completion of 15 years premium or on satisfaction of proof of death and title of the assured." It is not disputed that plaintiff's mother paid the premia for 61 months, that is, till May 1911 that she made no further payments and that she died on the 6th April 1914. The suit was brought to recover the amount which might be found due on taking accounts with interest thereon from 15th April 1914 and the claim was valued at Rs. 143-12-0 namely, twice the amount of the premia paid plus interest.

The District Munsif dismissed the suit on the ground that the policy had lapsed on account of the non-payment of premiums. In appeal plaintiff gave up a portion of his claim. The Subordinate Judge reversed the decree of the District Munsif and held that plaintiff was entitled to recover Rs. 61 the amount of the premia paid. The principal question for decision in this appeal is whether the plaintiff is entitled to claim a refund of the premiums paid by his mother. Under the rules of the Company which were in force when the policy was issued, policy-holders had the option of discontinuing the payment of the monthly premiums after they had paid for 60 months. See rule 33(c) which provided that if the present policy-holders so desired they might pay the entire amount for 60 months and stop paying monthly premiums. An extraordinary general meeting of the Directors was held on the 29th December 1910, and it was

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resolved to alter the existing rules in view of the unsatisfactory financial position of the Company. Another extraordinary general meeting was held on the 15th January 1911 and it was resolved that the amended rules be confirmed and adopted agreeably to the special resolution framed on the 29th December 1910 which was confirmed. See Exhibit D. The resolution of 29th December 1910 was communicated to the Registrar of Joint Stock Societies and recorded by him. Rule 49 of the new rule provided that if premiums be not paid for four successive months on a policy the policy would lapse without any notices being given by the Company to the defaulter, but a lapsed policy might be renewed within six months from the date of the lapse on payment of a fee for renewal and arrears of premia. Rule 50. Rule 70 says that premiums shall be payable till the death of a policy-holder. Rule 33 (c) of the old rules was not altered by any express rule in Exhibit D, but I doubt whether the Subordinate Judge is right in saying that Rule 49 applies only in the case of those policy-holders who have not paid premia for 60 months, and that Rule 70 in Exhibit D must be read with the old Rule 33 (c). The Subordinate Judge goes on to say " a lapsed policy means a void policy. The Insurance Company must be ready to refund the premia paid in the case of a lapsed policy on the date of the death of the policy-holder. * * * In the absence of an express stipulation for the forfeiture of the premia on avoidance of the policy it seems that in order to obtain cancellation the insurer must at least in the absence of fraud be ready to return the premia."

The Subordinate Judge, has I think, misunderstood the law on the subject, and it appears to be clear from the authorities to which the learned Vakil for the appellant has referred us that when a policy lapses owing to non-payment of the premium the assured is not ordinarily entitled to claim a return of the premium paid. "When the policy is void *ab initio* or in any case where a premium has been paid but the risk has not been run, whether this has been owing to the fault, pleasure or will of the assured or to any other cause the premium shall be returned by the insurers, but, if the risk has once commenced there shall be no apportionment or return of the premia afterwards." Bunyan on Life Assurance, 5th Edition page 109;

Bermon v. *Woodbridge* [1]. "The law as to the right of an assured to claim a return of the premium in the case of the policy being or becoming void is the same in Life Assurance as in Marine Insurance". Halsbury's Laws of England Vol. XVII page 557. "Where a policy which is not illegal is void *ab initio* and no risk is run, the assured is entitled to a return of the premium he has paid, but, if the risk has once commenced, the premia cannot in the absence of fraud be reclaimed. On the other hand, if the assured is entitled to have the policy cancelled on the ground of his having been induced to enter into the contract of insurance by the fraud of the insurers he is entitled to recover the premium he has paid." Halsbury Vol. XVII page 558. The Subordinate Judge was of opinion that plaintiff was entitled under S. 65 of the Contract Act for a refund of the premium paid by his mother, but S. 65 applies only to cases where the agreement is discovered to be void or the contract becomes void at law for any of the reasons specified in the Contract Act. *Oriental Government Security Life Assurance Co., Ltd.* v. *Narasimhachari* [2].

It remains, however, to consider the question whether the new rules of the society infringed the rights of the policy-holder and are binding on the plaintiff's mother. Rule 70 which required policy-holders to continue making payments until death undoubtedly introduced an important change in the rules. The contract between the parties is contained in the policy of insurance, and plaintiff's mother did not take out the policy subject to the rules then existing *as well as to the rules which might be framed or altered otherwise.* The words in the policy are "The Company shall be liable to pay * * * to the assured such sums as shall become due or payable by virtue of the rules contained on the back hereof agreeable to the regulations of the Company on the completion of the payment of 15 years' premiums." It is significant that the letters, Exhibits C and C1 from the Secretary merely say that as plaintiff's mother had discontinued payments she would not be entitled to interest thereby implying that the was justified in discontinuing payments. As regards the extent to which a Company can affect the rights of members by an

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[1] (1781) 2 Dougl. 781=99 Eng rep. 497.

[2] (1901) I. L. R. 25 Mad. 183, at p. 214.

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alteration in the articles I may refer to Lindley on Companies Vol. I, 6th Edition at page 463 : "When considering contracts referring to revocable articles it must not be assumed that the contract involves as one of its terms that the articles shall not be altered and the terms of the contract thereby varied. If there is any such agreement these rights cannot be altered by an alteration of the articles ; If there is no such agreement they can be so altered, provided the alteration does not affect rights which have ripened into claims for something already done under the contract in its original form." See *Allen* v. *Gold Reefs etc. Ltd.* [1]

British Equitable Insurance Company v. *Baily* [2] was strongly relied on by the learned Vakil for the appellant. The House of Lords decided in the case of a Life Assurance Company that the company could alter its bye-law and alter its practice in the distribution of the profits, and thereby vary its contract with a policy-holder, but it appears to be clear from the judgments of learned Lords that the decision of the case turned on the question whether the prospectus formed part of the contract. Lord Lindely says at page 41 "The prospectuses not being referred to in the policies, cannot, in my opinion, be legitimately referred to in order to construe the contracts into which the policy-holders have been induced to enter. These contracts are to be found in the Policies themselves." Lord Macnaghten did not dissent from the proposition stated by Cozens Hardy, M. R., that a company cannot by altering its article justify a breach of contract. For the foregoing reasons I agree with my learned brother that the Insurance Company by altering its rules had no power to affect the rights of policy-holders whose contracts were concluded, and that the appeal should be dismissed with costs.

A. S. V.

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[1] (1900) 1. Ch. 656.

[2] (1906) A. C. 35.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE BAKEWELL AND MR. JUSTICE ODGERS.

Ayyasami Mudaliar ... *Appellant,** *(Plaintiff).*

v.

Appandai Nynar ... *Respondent. (Defendant).*

Ayyasami Mudaliar
v.
Appandai Nynar

Arbitration—Award—Validity of—Concurrence of all the arbitrators essential.

An award to be enforceable in law, must be the award of all the arbitrators without difference.

United Kingdom Mutual Steamship Assurance Association v. *Houston & Co.,* [1] Relied on. *Mahomedali Adamji* v. *Secretary of State for India* [2] distinguished.

Second Appeal against the decree of the District Court of Chingleput in Appeal Suit No. 51 of 1918 preferred against the decree of the Court of the Additional District Munsif of Chingleput in Original Suit No. 40 of 1917.

C. V. Ananthakrishna Aiyar, for Appellant.

S. Duraiswami Aiyar, for Respondent.

The Court delivered the following

Judgment :—In this appeal two points are argued for the appellant : (1) that he should be allowed to amend his plaint which as it stands, asks for an enforcement of an award of arbitrators, so as to allow him to bring a suit for dissolution of the partnership which subsisted between plaintiff and defendant ; (2) that the award is valid even though it is only signed by five out of the seven arbitrators, appointed by the Muchilika (Exhibit I). As to the first point, we are unable to say that such an amendment would not alter the character of the suit and there is also this consideration, namely, that plaintiff had ample opportunity to bring this suit for dissolution in the past. He presented a petition to amend his plaint to enable himself to do this to the District Munsif on 18th June 1917. The issue as to the validity of the award was raised as long before this as 21st July 1916. The petition was rejected on 25th August 1917 and judgment was given in the suit to enforce the award on 1st November 1917. The suit for an account of the partnership dealings would not have been barred till 20th November 1917,

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* S. A. No. 171 of 1919. 27th October, 1919.

[1] (1896) 1 Q. B. 567.

[2] (1917) I. L. R. 42 B. 668.

Ayyasami Mudaliar v. Appandai Nynar.

At the hearing on 1st November 1917 plaintiff did not examine himself or any witnesses and asked for more time which was refused. It is thus apparent that plaintiff had plenty of opportunity of bringing another suit on an account and did not avail himself of it. We are therefore not disposed to allow him to do so on Second Appeal. As to the second point, an award must be signed by all the arbitrators (See Russell on Arbitration and Award, 9th Edn. Part II Chapter IV Section 3 Note 4 at page 168.) Mr. Anantakrishna Aiyar has drawn our attention to the opinion of Beaman, J., in *Mahomedali Adamji v. Secretary of State for India* [1] that parties must be assumed to contract that a majority award shall bind them when an uneven number of arbitrators are appointed. But that was a case of valuers and it is not clear that it would be the same in the case of arbitrators. The learned Judge himself at page 673 quotes a ruling of Mathew, J., (*United Kingdom Mutual Steamship Assurance Association* v. *Houston and Co* [2]) that in every case of arbitration unless all the arbitrators concurred in the award there would be no arbitration award at all. In this state of things we cannot follow the opinion of Beaman, J., in the present case and it is clear that the award in suit is unenforceable in law.

The appeal therefore fails on both these points and must be dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE BURN.

A. L. A. C. T. Solayappa Chetty ... *Appellants* in the appeal and petitioner in the petitions, (1st defendant.)*

v.

R. M. M. L. Lakshmanan Chetty and others. ... *Respondents in the appeal and in the petitions. (Plaintiffs and defendants Nos. 2 and 3.)*

Solayappa Chetty v. Lakshmanan Chetty.

Civil Procedure Code, S. 151 and O. 44 R. 1—Appellate Court—Inherent power to allow appeal to be continued in forma pauperis—*Court's discretion*.

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* A. S. No. 278 of 1914, and C. M. P. Nos. 1063 and 1655 of 1919. 28th August. 1919.

[1] (1917) I. L. R. 42 Bom. 668 at page 675,

[2] (1896) I. Q. B. 567.

Solayappa Chetty v. Lakshmanan Chetty.

Assuming that an appellate court has *inherent* power to allow an appeal presented in the ordinary form to be continued in *forma pauperis*, the court's discretion should be exercised subject to the conditions specified in the proviso to O. 44 R. 1 of the Code of Civil Procedure.

Nirmul Chandra Mookerjee v. *Doyal Nath Bhattacharjee* [1], *Revji Patil* v. *Shaharam* [2], *Thompson* v. *The Calcutta Tramway Co.* [3] Referred to.

Appeal No. 278 of 1914 purporting to be against the third preliminary decree, but since converted by the order of the High Court dated 6th December 1918 into an appeal against the final decree, of the Court of the Subordinate Judge of Ramnad at Madura in O. S. No. 371 of 1910.

S. T. Srinivasagopalachariar, for the Appellant-petitioner.

C. Krishnamachariar, for the 1st Respondent.

The Court made the following

Order :—C. M. P. No. 1655 of 1919 is an application, under S. 151 of the Code of Civil Procedure praying that the Petitioner may be allowed to continue the appeal as a pauper, (the appeal having been filed long ago as an ordinary appeal in the regular course) so that the petitioner may be exempted from payment of the additional court fee of Rs. 2,900 and odd which he would have to pay if the appeal was prosecuted further as an ordinary appeal.

Appeal No. 278 of 1914 was filed in the first instance against the so called third preliminary decree passed on the 20th of April 1914 in the Ramnad Subordinate Judge's Court and the appeal was presented on the 3rd of August 1914. The appeal has since been converted by an order of this court dated 6th December 1918 into an appeal against the final decree passed by the Ramnad Court on the 29th October 1914 which followed the judgment of the same date (29-10-1914), the judgment or order passed (as third preliminary judgment) on the 20th of April 1914 being treated as part of the final judgment of the 29th October 1914. The petitioner (appellant) was directed, on the 6th December 1918 to pay the additional court fee within two months, but he has not yet paid the same though it is nearly nine months since that order was passed. He put in several applications for extensions of time and the latest of those applications is C. M. P. No. 1063 of 1919 which we may at once dismiss, as he is unable to pay the balance of court fees and as it is therefore not pressed.

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[1] (1877) I. L. R. 2 C. 130.

[2] (1884) I. L. R. 8 B. 615.

[3] (1893) I. L. R. 20 C. 319.

The present application C. M. P. No. 1655 of 1919 was filed on the 14th July 1919 and it is not disputed that the petitioner is a pauper. This application does not fall under O. 44 R. 1 of the Civil Procedure Code, as the appeal has already been filed as an ordinary appeal, and hence the petitioner has been obliged to invoke our powers under S. 151 of the Code of Civil Procedure. The first question, therefore, is whether we have got jurisdiction under that section to allow a person to continue an appeal as a pauper. The decisions in *Nirmul Chandra Mookerjee* v. *Doyal Nath Bhattacharya* [1], *Revji Patil* v. *Sakharam* [2] and *Thompson* v. *The Calcutta Tramway Company* [3] support the petitioner's contention that we have got the power to allow the prosecution of an appeal to be continued in *forma pauperis*. There may, no doubt, result an anomaly in holding that such a power exists because, while under Art. 170 of the Limitation Act a person who puts in an application for leave to appeal as a pauper has got only one month's time from the date of the decree appealed from, an application under S. 151 for permission to continue an appeal as a pauper would be probably governed by the general Art. 181 : "three years for applications for which no period of limitation is provided elsewhere." It seems, again not advisable to express a final opinion on this question involving liability for payment of court fees due to Government (and in which the Government therefore is interested) without giving notice to and without hearing the arguments of the Government Pleader. Assuming for the the sake of argument that we have got the power, it is clear that we should exercise our discretion subject to the conditions imposed by the proviso to O. 44 R. 1 on a court to which an application is made by a person to allow him to appeal as a pauper; that is, unless from a perusal of the appeal memorandum and of the judgment and decree appealed from there is reason to think that the decree is contrary to law, or to some usage having the force of law, or is otherwise erroneous or unjust, the court is bound to reject the application. We have read through the appeal memorandum and the judgment

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1. (1877) I. L. R. 2 Cal. 130.
2 (1884) I. L. R. 8. Bom. 615.
3 (1893) I. L. R. 20 Cal. 319.

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and the decree appealed from, including in the word 'judgment' the order of the 20th April 1914, and we have also taken the assistance of the Vakils on both sides to understand what we have read, and we are not satisfied that the decree is contrary to law or to any usage having the force of law or is otherwise erroneous or unjust. We shall therefore, dismiss this petition also. There will be no order as to costs in either of the petitions.

As the extension of time to pay court-fees has expired the appeal will stand rejected with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SADASIVA AIYAR.

Raja Keesara Venkatappayya *alias* Venkata Appa Rao, and others ... *Appellants* (Plaintiffs Nos. 2, 3, 5 and 6 and party appellant).*

v.

Raja Nayani Venkataranga Rao and others. *Respondents (Defendants Nos. 2, 4 to 6).*

Raja Keesara Venkatappayya
v.
Raja Nayani Venkataranga Rao.

Impartible Estate—Custom of impartibility—Primogeniture—Evidence of—Madras Regulation XXV of 1802—Grant of sanad, effect of—Suit for partition—Heirs of tenants-in-common—Adverse possession—Limitation—Limitation Act, art. 127 and 144—Registration Act, Ss. 17, (3), 23, 26, 35, 40, 41 and 87—Authority to adopt executed outside British India by subject of Native State—Registration, if necessary—Document, presentation of, after expiry of prescribed period—Registration, if valid—Presentation of document by natural father of minor given in adoption—Effect of.

The question whether an estate is impartible and decends by the law of primogeniture or is subject to the ordinary Hindu law of inheritance must be decided on the facts of each case. *Held,* on the evidence in the case, that the Zemindari of Munagala was an impartible estate.

Per Chief Justice : In the present case, there was even before the permanent settlement, an hereditary property in the Zamindary to which the custom of primogeniture could attach and the permanent Settlement of 1802 merely recognised and confirmed the proprietary rights of the Zemindar subject to a fixed assessment.

Ramakanta Das Mohapatra v. *Shamanand Das Mohapatra* [1] distinguished. *Mallikarjuna* v. *Durga* [2] Relied on.

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* A. Nos. 426 and 427 of 1914. 1st May 1919.

1. (1909) I. L. R. 36 C. 590=19 M. L. J. 239.
2. (1890) I. L. R. 13 M. 406=17 I. A. 134.

Raja Keesara Venkatappayya
v.
Raja Nayani Venkataranga Rao.

Per Sadasiva Ieyer, J.—Whether a Zemindari had an ancient origin, whether it was in the nature of a military tenure, whether there has been a confiscation and re-grant, whether the Government divided the estate and re-granted it in parcels to junior members of the family or to strangers,—these and similar considerations are relevant to the determination of the question of impartibility. Of greater evidentiary value than these, are the course of descent of the property for generations, the inner conviction of the members of the family as shown by their conduct and declarations from time to time and the admissions by members of the junior branches against their own interest.

Art. 127 of the Limitation Act applies to suits by one or more members of a joint family against other members to enforce a right to share in the joint family property and does not apply to a suit brought after partition by some members of the family when they have become tenants-in-common and the exclusion is therefore not from joint family property within the meaning of the article. A suit for partition by the heir of one tenant-in-common against the heirs of the other tenants-in-common is governed by Art. 144. Where on the death of one of the tenants-in-common, his heir enters into exclusive possession of the whole property asserting an absolute and exclusive title in the deceased, the possession of the heir is adverse to the surviving tenants-in-common or their heirs.

S. 17 (3) of the Registration Act has no application to an authority to adopt executed outside British India in a Native State by a person domiciled in that State. S. 49 of the Registration Act does not therefore, render the document inadmissible in evidence for want of registration.

Observations on the extra-territorial operation of municipal legislation.

Cooke v. *Charles A. Vogeler & Co.* [1], *Dulaney* v. *Merry & Son* [2], *Swifte* v. *Attorney General for Ireland* [3]. Referred to.

Obiter : The registration of a document, other than a will, presented beyond the period prescribed by Ss. 23 to 26 of the Registration Act, is invalid. It is not a mere irregularity in procedure cured by S. 87 of the Act.

The natural father of a minor boy who is adopted by a widow in pursuance of a written authority to adopt given by her husband, is competent to present that document for registration on behalf of the minor.

Appeals against the decrees of the District Court of Kistna at Masulipatam in Original Suits Nos. 56 and 45 of 1895.

K. Srinivasa Aiyangar, P. Somasundaram and *P. Narayanamurthi,* for Appellants.

The Hon'ble The Advocate-General, V. Lakshminarayana, K. Koti Reddi, The Hon'ble Mr. T. Rangachariar, S. Varadachariar, A. Krishnaswami Aiyar and *C. Rama Rao,* for Respondents in A. S. No. 426 of 1914.

The Court delivered the following

Judgments :—*The Chief Justice* :—These are appeals from decrees in two suits which were tried together and disposed of by one judgment, O. S. No. 30 of 1893 and O. S. No. 38 of 1895 in the Subordinate Court of Ellore re-numbered O. S. Nos. 45 and 56 of 1895 in the District Court of Kistna.

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[1] (1901) A. C. 102.
[2] (1901) I. Q. B. 53.
[3] (1912) A. C. 276.

In the first suit the plaintiffs sued at first as members of an undivided family to recover the Zamindari of Munagala from the 1st defendant, the Court of Wards and the 2nd defendant, the alleged adopted son of the daughter of the last male owner who died in 1854, on the ground that they had wrongfully taken possession of it on the death of the daughter in 1892. At a late stage they filed an additional written statement in which they claimed no doubt with reference to the plea of limitation, not as members of an undivided family, but on the footing that the joint family had become divided in status, and that in law all the family properties including this had been all along in their possession as tenants-in-common.

The other suit for practically the same reliefs was filed by the members of the family who claimed to be the next reversioners if the estate was impartible. For some reason which is not explained, possibly because of deaths among the parties and delay in bringing in the legal representatives, these suits were not disposed of by the District Court until March and April 1904, when the then District Judge dismissed the first suit without trial on the ground that the plaintiffs had entirely altered their cause of action in the additional written statement, and the second suit because the plaintiff had already claimed the same relief in the other suit. The judgments of the District Judge in the two suits were set aside and the suits remanded by the High Court by orders of December 1909. Both suits were then tried and disposed of by Mr. F. A. Coleridge, District Judge of Kistna, by a common judgment on the 14th April 1914, more than twenty years after the filing of the first suit, and the appeals came on for hearing before us nearly five years after that judgment. The only explanation for these lamentable and almost unprecedented delays at every stage appears to be that many parties died and much time was taken in bringing in their legal representatives and serving them.

The District Judge tried the case very carefully and dealt fully with the various questions which arise in a very lengthy judgment which might, as he explains, have been shorter if he had not been writing against time so as to dispose of the case himself instead of leaving it to his successor. He has shown in a careful examination of the evidence that the plaintiffs have endeavoured to support their case by a number of spurious documents manufactured for the purposes of the case, and I may say at once that his conclusions in this respect have not been disturbed by the arguments addressed to us. I do not therefore propose to go over this ground again.

There are three important issues in the case, whether the estate is impartible, whether the 2nd defendant was duly adopted by the daughter of the last Zamindar, and whether the suit is barred by limitation. The District Judge has found on all these points for the defendants and has accordingly dismissed the suits.

The District of Kistna in which Munagala is situated forms part of the Northern Circars, which was at first under the Hindu Rajas, and then formed part of the Kingdom of Golconda which was conquered by Aurungazebe at the close of the seventeenth century. Subsequently the Circars were included in the Subbah of the Deccan and were governed by the Nizam until the middle of the eighteenth century, when they passed for a time into the hands of the French. Then after Col. Forde's successful operations, Lord Clive obtained a Sannad from the Imperial Court at Delhi assigning them to the East India Company.

Mr. James Grant in his Political Survey of the Northern Circars, which was submitted to Warren Hastings in 1784 and is re-printed as an appendix to the Fifth Report, Vol. 3, p. 1 of the new Calcutta Edition, gives a full account of the condition of the country from the time of the Golconda dynasty which was overthrown by Aurungazebe in 1687. There is no reason to doubt that at the time the District or Pergunah of Munagala was in the possession of the last survivor of a very ancient Reddi family who held it as *deshmuk* or *Chauduri* under the ruling power. Mr. Grant's view as to the position of these *deshmuks* and *Chauduris* is very similar to that taken by Mr. Stirling in 1821 in his report on Cuttack on which the Privy Council based their judgment in *Ramakanta Das Mohapatra* v. *Shamannad Das Mohapatra* [1]. They were generally in the position of renters who in consideration of the revenue, military and police services, were allowed certain *Savaram* or rent free lands in different parts of the district together with a fixed share of the collections. Sometimes the hereditary renter might be the head of a once ruling family, and even when he was not,the office tended to become hereditary in the family of the holder, but the tenure was liable to be put an end to by the ruling power. The fact that the office was hereditary and held for some generations by the senior member of the family was held insufficient in the case last mentioned to prove a special custom of impartibility among the descendants of the holder with whom the British Government effected a settlement so as to derogate from the statutory rule that in the absence of custom, the estate was to be descendible according to the ordinary rules of inheritance.

Their Lordships observed :—" They show, indeed, that the office of Chowdhuri was held for many generations, by a member of the family and that to the holder of that office certain lands were assigned as a part of his remuneration. But the grant was of an office only, and to an individual, to be held during good behaviour. It was clearly revocable at the pleasure of the sovereign, by whom it might be conferred, not merely on the eldest son, but upon any member of the family, or, indeed, on anybody. In the nature of things, the office could only be held by one person at a time, and as Mr. Stirling points out, such offices were "generally heritable"; but these considerations, though they may suggest a presumption, are not sufficient to establish a right. For this purpose, the evidence must be clear and unambiguous, which, in this case, it is not. Besides, it is hard to see how a family custom of succession to an estate not absolutely owned by the family could ever have existed " [2].

This decision which was based on the facts of the particular case must however be applied with caution, because a decision of this Court based on very similar grounds as regards the Zamindari of Devarakota, which is also in the Kistna District,

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1. (1909).I. L. R. 36 Cal. 590.

2. I. L. R. 36 Cal. 590, 598.

was reversed by the Privy Council in *Mallikarjuna* v. *Durga.* [1] Their Lordships considered it unnecessary to go back further than 1766, the date of the cession to the East India Company. They referred to the fact that before the permanent settlement the rights of the Zamindar had been recognised by the Company as opposed to the view of the High Court that changes of possession of the Zamindari were simply acts of administration, and later in their judgment they laid stress on the fact that the permanent sannad issued under Reg. XXV of 1802 was a recognition of such hereditary right.

They said that Ankadu, the grantee, "thus acquired a permanent property in the land at a fixed assessment, but there was no grant of the land, and the rule of succession to it was not altered. The Estate remained entire, and there is no evidence of any intention of the Government to alter the nature of the tenure". In effect they held that, even before the permanent settlement the Zamindars had an hereditary estate to which the custom of succession by primogeniture could and did attach.

From 1766 the proprietory right of the Zamindar of Munagala does not seem to have been questioned. The name of Keesara Lutchey is to be found in the list of Zamindars in the Northern Circars in the Minutes of Consultation of the Government of Fort Saint George for 1766, Exhibit X. The Company no doubt dealt with her as the mother and guardian of the minor Keesara Venkataramanah, the fourth Zamindar in the pedigree Al, to whom the cowle, Exhibit D, was granted. The fact that the Company at the outset dealt with the mother of the minor head of the family is a strong evidence both of their recognition of his proprietory interests and of the custom of impartibility in the family. Exhibit D1, dated 12—4—1771 was granted in 1771 by the Governor of Fort Saint George fixing the assessment for three years for the Purgunah of Munagala then in his possession. In Exhibit X (a) which is an extract from the Minutes of Consultation of 31—8—1774, he is included in a list of Zamindars with whom tribute had been settled. Exhibit A is a pedigree of the "Keesarvar family of Moonagalah Purgunah" presented to Government at the time of the permanent settlement, Venkata Narasimha aged 44 is shown as the "present Desmook". Exhibit XII, dated 21—1—1803 is a letter from the Collector reporting his death and stating that he had left a son Kodandaramiah, "to whose succession to his father's estate I perceive no objection". The letter referred to the receipt of a permanent cowle or sanad for delivery to the Munagala Zamindar, and reported the Zamindar's death in order that the necessary alteration might be made. The son's name was accordingly substituted in the permanent sunnad, Exhibit XI, which recognised him as Zamindar and authorised him "to hold in perpetuity to your heirs, successors and assigns at the permanent assessment herein named the Zamindary of Moonagalah". As observed in the Devarakota case, there was no fresh grant but the proprietory right of the Zamindar was recognised and confirmed at a fixed assessment. In my opinion, in this, as in the Devarakota case there was before the permanent settlement an hereditary property in this Zamindari to which the custom of primogeniture could attach, and I think that on this ground the case is distinguishable from the more recent decision in *Ramakanta Das Mohapatra* v. *Shamanand Das* 1. If it were to be held that prior to the permanent settlement the Zamindars were only Desmooks with no proprietory interest in the Zamindari and that the sannad bestowed the Zamindari as private property on Kodandaramiah and his heirs descendible according to the ordinary rules of succession and therefore partible, this would be fatal to the claims of the plaintiffs who are not descended from him but claim as his collaterals. In that case the Zamindari was his self-acquisition, and the 2nd defendant, if his adoption be proved, would be entitled to succeed as daughter's son of the last male owner. On the other hand, if the sunnad only confirmed a previously existing proprietory interest, then it must be held on the authority of *Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Venkondora,* 2 that the sunnad enured for the benefit of the family according to their interests, and did not deprive them of a right of partition if the estate was joint and partible. There is no reason to doubt that in the seventeenth century Munagala was held by the head for the time being of an ancient family as Desmook or Chowdari

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[1] (1890) I. L. R. 13 Mad. 406.

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1. (1909) I. L. R. 36 C. 590 (P. C.)

2. 13 M. I. A. 333.

under the Golconda kings, and it may possibly be that the family itself was descended from former rulers. According to the tradition, which there is no reason to doubt, on the death of the last of the Reddis shortly before 1693 his widowed daughter-in-law secured it for her own family known as the Keesara family to which the parties belong. Exhibit IX of the year 1693, not 1725 as the District Judge supposed, is a written summons in Persian and Telugu. The Persian part bears the seal of servant of the Emperor Aurangazebe or Alamgir (the name appears in the Telugu portion as Buda Chidanand) and calls on Keesara Mukund, the common ancestor of the parties, as Zamindar, to present himself with an armed force. The Telugu part is to the same effect but states that the Sardar is coming to punish the rebel Asway Row. This document appears to prove that Mukund was the recognised Zamindar of the District in 1693. According to the plaintiffs he was the second of the three brothers to whom their sister, the widowed daughter-in-law of the last Reddi, transferred half the Zamindari in 1690. The other half, they state, had been alienated by the last Reddi himself in 1684 and was bought back by the three brothers in 1705. The Zamindari was thus the joint acquisition of the three brothers and always remained joint family property. The originals of these deeds are not forthcoming but Exhibit BB series, a list of useful documents connected with the estate in the possession of the Court of Wards in 1893, includes such documents which are not now forthcoming. As secondary evidence, the plaintiffs produced from the Oriental Manuscripts Library a book of transcriptions from manuscripts deposited in the collection which included these three documents and also an incomplete kyfiat, Exhibit C3, forwarding them to some authority, probably the Collector as agent of the Court of Wards. The contents show that the kyfiat, if genuine, was written between 1816, when an amin was put in possession of the Estate and 1818 when it was handed over to the Ward on his attaining majority. The District Judge was under the impression that the manuscripts copied into his book came from the well known Mackenzie collection, but this is negatived by the date. Col. Mackenzie, as appears from the introduction to the printed catalogue of his manuscripts in Madras, left the Northern Circars, where he had collected manuscripts, in 1807. He afterwards served in the expedition to Java, and made the collections there which are now in the India Office. He did not return to the Circars, and cannot have collected these documents. It has therefore not been explained how the copies which were transcribed into the book produced got into the Oriental Manuscripts Library here. Exhibit C. of the year 1687 purports to be a transfer by the last Reddi of half of his Chowdari Mirasi of the Munagala purgunah for pags. 500,and provides that the transferees Siddalooru Venganna and Ramanna and their posterity are to discharge in perpetuity the office of Chowduri. It appears that in the Bombay Presidency lands attached as endowments to offices and the offices themselves were often the subject of transfer, see *Adrishappa* v. *Gurushidappa* [1], but it is not shown that it was so on this side of India, where the general rule is that both the offices and the endowments are inalienable. It is not suggested that the transferees got into office under this grant. Exhibit IX shows that Mukunda was the Zamindar in 1693 and Exhibit C. on which the plaintiffs rely is a copy of a deed of gift of 1690 by the daughter-in-law reciting that the Desaigiriship was in her enjoyment and tranferring it to her three brothers Keesara Peddi Reddi, Keesara Mukunda, and Royappah.

It is not easy to reconcile this with the summons of 1693, Exhibit IX, which shows that the second of the three brothers was the recognised Zamindar although according to C-2 the eldest brother Peddi Reddi survived until 1705. C-2 which is dated in that year purports to be a transfer by the representatives of Siddalooru Venganna and Ramanna to the three brothers Peddi Reddi, Mukunda, and Royappah of the share of the Chowdariship of Munagala whichVenganna and Ramanna had purchased, not as in C-1 from the last Reddi, but from Nagappa Garu and another who according to this deed possessed a share in the Chowdariship. According to the statement in the kyfiat Exhibit C-3 the Siddalooru family, not only never enjoyed the office but were expelled from the country for adhering to rebels and were living in exile at Conjeevaram near Madras, when the three brothers, one of them the recognised Zamindar,arranged to pay pagodas 2,000 for their unsubstantial rights and sent this, sum to them in exile at Conjeevaram. It seems an extraordinary story, and I am not prepared to place much reliance on these documents which are first heard of in connection with a dispute between the Court of Wards and the family between the years 1816 and 1818, as evidence that the Zamindari became the joint family property of the three brothers. It is worthy of observation that all the pedigrees begin with Mukunda and do not include the name of his alleged brothers Peddi Reddi and Royappah.

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[1] (1880) I. L. R. 4 Bom. 494. (P.C.)

As to the custom of impartibility in this family I agree with the District Judge that it is established by the evidence. The pedigree, Exhibit A, appended to the Collector's Report of 1824, Exhibit F, shows that the succession was according to the custom of primogeniture, the names of the successive Zamindars or Deshmooks being inserted in circles marked yellow to distinguish them from the other members of the family. As I have already pointed out, in 1766 the Company dealt with Lutchey, the mother of the minor Zamindar, and this is also evidence of recognition of the custom. Exhibit XII shows that at the death of Venkatanarasimha in 1803 his brother Booloka was alive, and it may be gathered from the letter that he did not claim as the eldest member of the joint family that the permanent sunnad should be his name but was willing to superintend the conduct of his young nephew Kodandaramiah to whom the sunnad was given.

Kodandramiah died in 1814, and the estate was taken charge of by the Court of Wards under Regulation V of 1804 without objection, which had no authority to take charge unless the estate belonged to the minor. Exhibit XIII reports that the surviving cousin of the deceased declared the minor was the rightful inheritor and that his rights were fully acknowledged by the cousin of the deceased. Exhibit XIII (*a*) contains a pedigree (torn) and a statement taken from them. With reference to Kodandaramiah, the Istimrar Zamindar, the pedigree states that although he was younger than his four uncles the sunnad was bestowed upon him according to the former usage of their Samasthanam. This is the clearest recognition of impartibility. The statement says that on his death-bed Kodandaramiah commended the junior members to obey Venkataramiah who was the eldest of his uncles, and they stated that according to usage the Zamindari should be in the name of Kodandaramiah's minor son and that "the right of the Zamindar should be vested in him", and they could manage for him. This was signed by Nos. 2, 17, 27 and 34 in the pedigree. The eldest dayadi accepted the office of Manager under the Court of Wards but beyond paying the kists failed to account for the collections. The Collector also reports that it was set up that the property in the Nizam's territories belonged to another branch of the family, and he vainly attempted to obtain particulars about it through the Resident at Hyderabad. All he could ascertain was that the Keesara family had for a very long time enjoyed the Russoms and Savarams of a Zamindari of 13 villages in the Cumbummet Havelly or Purgannah under the litle of Desmook, Exhibit I (*b*), dated 7—10—1815. As he could not get the member of the family in the management to account, the Collector removed him from office and put in an ameen, Exhibit XIV (*b*) 4—6—1816. It was at this stage that the Kyfiat Exhibit C—3, if genuine, was submitted in which it is sought to lay a foundation for representing the property as belonging to the whole family and the documents C, C-1 and C-2 were put forward in support of this case, while at the same time it was not denied that the Estate had been ruled by Mukundappa. There are numerous inaccurate statements in the document. It is clearly an incomplete copy of the original, if any, and is in my opinion open to considerable suspicion having regard to the time when it came into existence. The Estate was handed back to the Zamindar with the outstanding balance on his attaining majority on 5—1—1818, Exhibit XIV (*e*) and the junior members do not seem to have taken any exception to this.

In 1824 the Collecter of Kistna presented a report on the Zamindaries in his District and his report on this Zamindari is the strongest evidence in favour of the plaintiffs. It is based on the old pedigree in the office, no doubt, Exhibit A—3, the one put in connection with the permanent Sunnad and a new one "recently furnished by the present Zamindar together with the required explanation". After repeating the story of the acquisition by Mukunda and his two brothers," it states that it is in the enjoyment of the descendants of Mukundappa as the two persons died without issue. Venkatanarasimha Rao the present *Zamindar* is the sixth person from the said Mukundappa. Although there were second sons in every generation of this family, yet it appears that no division of the taluq was ever made between them, but the profits derived from it were enjoyed by all reserving only to the head of their family the title of Deshmookor *Zamindar*". Having regard to the facts that no such claim as this was put forward in 1803 or again in 1814, and to the fact that the estate balance was handed over to the Zamindar on attaining his majority in 1818 I cannot help doubting whether this information was not supplied to the Collector by the junior members of the family rather than by the *Zamindar*. This suspicion is enhanced by what took place on his death in 1835. He adopted a boy on his death-bed and by his will, Exhibit H-2, appointed the boy's natural father as his guardian. The will directed him to continue to provide for the four families, the descendants of the Istimrar's uncles. Exhibit H—1 is an arji addressed by the *Zamindar* to the Collector in which he asked that the *Zamindari* should be placed in the management of the Court of Wards and enclosed a bootad list or list of allowances to be paid which in my opinion included the payments to be made to the junior branches for maintenance. The list is not forthcoming but some particulars of it are to be found in Exhibit H. The report, Exhibit H-3, makes arrangements for the management and estimates that a balance will be available for the Zamindar on attaining majority. It does not appear that on this occasion the family put forward any such claims as are stated in Exhibit F. Exhibit XVI and XVI (a) show the difficulties which arose, and that the boy's natural father was placed in management under Regulation V of 1804. The fact that on the occasion of the minorities in 1814 and 1835 the Court of Wards took possession on behalf of the minor without objection from the members of the junior branches is strongly against the plaintiffs' case, because if it was joint family property, the senior adult male would have been entitled to manage. When the minor came of age in 1849 he was necessarily under the influence of his natural father who belonged to one of the junior branches. The properties in the Nizams's dominions had been outside the Court of Ward's jurisdiction during his long minority and disputes appear to have at once arisen about them. In these circumstances he joined in Exhibit K which provided for the management both of the Zamindari and of the Hyderabad properties by the Zamindar and a member of one of the junior branches for a period of fifteen years on what I will take to be terms of equal sharing. Exhibit K was modified by certain other agreements during his life-time. At the time of his death there were disputes about to be referred to arbitration and, as appears from Exhibit R, dated 29th January 1855, at the time of his death he was contending that the villages had been obtained from him by fraud, intimidation, and intrigue. Exhibit K was only for 15 years and the Zamindar died about five years after its execution. On his death in 1854 his widow was put in possession by the Revenue Authorities as next heiress, apparently according to the opinion of the pundits that the nearest heir to the Estate of a person divided from his coheirs was his widow, Exhibit R, and set up an authority to adopt under a will. One of the junior members then filed a suit to recover his one-tenth share of the Estate treating it as partible. This was traversed in the rejoinder put in by the widow, the 1st defendant, which has been exhibited as Exhibit XIX. The widow entered into a razinamah with the junior branches which was embodied in a decree, Exhibit W, after the objections of her mother-in-law, the 2nd defendant, had been over-ruled. The decree provided that the gnatis should assent to the adoption by the widow pursuant to her husband's will, of Venkataraghava Rao, son of one of the gnatis, than an annual allowance should be paid to each of the five branches and the balance of the collections should be deposited in Court on account, as I understand, of the Estate until the adopted boy attained majority.

It was argued before us that the impartibility of the Estate was acknowledged by this consent decree and that it barred the present suit. There would have been more force in this contention, if the decree had directed that the balance should be deposited in Court on behalf of the minor until he attained

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majority. Possibly that was the provision in the original razinamah which is not forthcoming, but it is by no means so clear in the consent decree. Whatever be the effect of the consent decree it did not in my opinion affect the possession which the widow had taken as heiress of her husband.

The boy who claimed to have been taken in adoption sued the widow to recover possession of the Zamindari in O. S. No. 2 of 1868 in the District Court of Guntur. The widow died in the same year and her daughter, the alleged adoptive mother of the 2nd defendant in this suit, was brought on the record in place of the widow and also took possession of the Zamindari which she enjoyed until her death in 1892, the boy's suit having been finally dismissed by this Court on 3—8—1872, Exhibit XX.

Now the succession of the widow of the late Zamindar and of her daughter after her was a clear denial of the claim of the junior branches that the estate was either joint family property or owned by the family as tenants-in-common. The possession of the daughter from 1868 onwards was, in my opinion, clearly adverse to the claim of the junior branches that it was joint family property. Their case now is that the different branches had become divided by the suit of 1857 or earlier, and if this is so, they are not in my opinion governed by Article 127 which covers suits by a person excluded from joint family property to enforce a right to a share therein. This article in my opinion applies to suits by one or more members of a joint family against other members to enforce a right to share therein against other co-parceners, and does not apply to a suit brought after partition by some members of the family against others when they have become tenants-in-common and the exclusion is therefore not from joint family property within the meaning of the article. Neither condition is to be found here. The suit is not against another member of the joint family but against the 2nd defendant claiming through his mother as heir to the last Zamindar, and the plaintiff does not now claim to be entitled to a partition as a member of a joint family, but as one of several tenants-in-common. If the suit can be regarded as brought by the plaintiff as the heir of one of the tenants-in-common against the 2nd and other defendants as heirs of the other tenants-in-common, then the suit must be governed by Article 144. In this view the possession of the Zamindar's daughter from 1868 to 1892 must in my opinion be regarded as adverse to and exclusive of the claims of the other branches of the family and adverse to them from the first within the meaning of Article 144. She did not enter as a tenant-in-common with the members of the junior branches, but as heiress to her father and entitled as such to succeed to the impartible Zamindari. The case of the junior branches from 1868 to 1882 was, not that the Zamindari was partible, but that the succession went not to the widow and daughter of the late Zamindar but to the senior dayadi ; and it was only in 1882 that they altered their position and renewed the claim that the estate was partible, a position they varied during the course of the suit by alleging that it was not partible joint family property, but as property enjoyed after partition by the family as tenants-in-common. The 2nd defendant's mother did not enter as heiress to one of several tenants-in-common but notoriously as heiress to her husband, and her possession was never that of one tenant-in-common holding on behalf of herself and the other tenants-in-common but adverse from the first to the claims of the junior members as tenants-in-common, and none the less so because of irregular payments made to them for maintenance. Such payments in those days having regard to the notions then prevailing in Southern India as to the nature of impartible estates and the interests therein of the junior members of the family were attributable to their position as junior members of the family and quite consistent with the claim to hold the estate as an impartible Zamindari adversely to the rest of the family. For the foregoing reasons I see no reason to differ from the conclusion of the District Judge that the estate is impartible and that the suits for partition are barred by limitation. These findings do not however dispose of the case, because the plaintiff in the 2nd suit is the nearest dayadi and the nearest heir of the late Zamindar if the 2nd defendant's adoption be not established, and he would be consequently entitled to succeed on the death of the Zamindar's daughter if his rights have not become barred by limitation. Now the rights of this plaintiff and the other members of the family as co-parceners or tenants-in-common or as preferential heirs to the Zamindar's widow and daughter have in my opinion become barred and extinguished under the Limitation Act, but the widow and daughter having taken as preferential heirs to the other members of the family, I do not think the rights of the other members of the family to succeed on failure of the daughter's line have been affected. It is therefore necessary to consider whether the 2nd defendant's adoption is established. There is really no dispute about the factum of the adoption, and the only question is whether the authority to adopt is duly established. The first question which arises is, whether the provision in Section 17 of the Indian Registration Act which requires authorities to adopt not contained in a will to be registered has any application to an authority to adopt given in Hyderabad outside British India by a subject of that State domiciled there. If not, such an authority is not a "document required by Section 17 to be registered" within the meaning of Section 49 of the Act, and is not affected by the provisions of that section. Now the limits of legislative authority are territorial and the Indian Legislature in particular has authority to legislate only for British India and British subjects in Native States. *Prima facie*, therefore, its enactments are not to be construed to apply to acts done outside British India even by British subjects. The authorities on the subject of the territorial effect of statutes are collected in the late Mr. Craies' Statute Law, 2nd Edition, pp. 393—425, and I will only refer to *Cooke* v. *Charles A. Vogeler Co.*,[1] *Dulaney* v. *Merry & Son*[2] and *Swifte* v. *Attorney-General for Ireland*[3] where it was held that an Irish statute enacting that, where one of the parties to a marriage was a Protestant, the marriage if celebrated in a particular manner *viz.*, "by a Popish priest" should be null and void, had no application to the marriage so celebrated in Austria of a Protestant domiciled in Ireland. The Indian Legislature might of course enact that an authority to adopt wherever and by whomsoever made should not be recognised in India for any purpose unless it had been registered in British India pursuant to the provisions of the Indian Registration Act, and we should be bound to give effect to that provision, as effect was given in the *Sussex Peerage Case*[1] to the provision of the Royal Marriage Act that no descendant of the body of George II should be capable of contracting matrimony without the previous consent of His Majesty and that any marriage of any such descendant without such consent first had and obtained shall be null and void. There is however a strong presumption against attributing to it any such intention.

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[1] (1901) A. C. 102. [2] (1901) 1 Q. B. 536. [3] (1912) A. C. 276.

The instruments of which registration is compulsory under the Act are enumerated in Section 17, and the effects of failure to register are to be found in Section 49. The documents which were required to be registered by the earliest Registration Acts all related to immoveable property, meaning of course immoveable property situated in British India; and it may be taken that the legislature has sufficiently manifested its intention that none of the enumerated documents affecting immoveable property situated in British India should be valid unless so registered even if executed outside British India, as held in *Hicks* v. *Powell* [2] more especially as Section 26 provides for the registration of such documents at any time within four months after their first arrival in British India.

Different considerations however apply to the provisions of Section 17 (3) which were first enacted in 1871 that "authorities to adopt a son executed after the first day of January 1872 and not conferred by a will, shall also be registered." That is a provision affecting status. The Indian Legislature has no authority to legislate as to the status of the subjects of Native States domiciled in such States and this provision cannot, in my opinion, on the well established rules of construction be read as extending to an authority to adopt conferred in Hyderabad by a subject of that State domiciled there, whose only connection with British India was that his wife owned property there. Questions of the validity of adoptions made outside British India by persons who are not British subjects may arise in our Courts, not only in connection with claims to succeed to immoveable property situated in British India, but also in other ways too numerous to mention, and it would in my opinion be altogether opposed to the accepted canons of construction to attribute to the Indian

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[1] (1844) 11 Cl. and F. 853 E. R. 1034.

[2] (1869) 4 Ch. App. 741.

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Legislature when it inserted in the Registration Act what is now Section 17 (3) an intention to interfere in any way with a question of such adoptions which is a matter outside its competence. For these reasons I am of opinion that the provisions of the Indian Registration Act did not apply to the authority to adopt the 2nd defendant; and that it is unnecessary to consider the further question whether these provisions were in fact complied with.

On the supposition that they were applicable much manifestly false evidence has been adduced on behalf of the plaintiffs to show that the authority to adopt was taken to Masulipatam and shown to the Collector shortly after its execution, as well as some not very satisfactory evidence on behalf of the 2nd defendant, which the District Judge has accepted, that, though the donee of the authority resided almost continuously in British India after her husband's death,the authority to adopt remained in the Nizam's dominions until shortly before the Registration proceedings. I do not consider it necessary to decide this question or the questions as to the construction of the Registration Act which arise if it be held applicable to this authority to adopt. As regards these questions of construction, I am inclined to agree with the conclusions of my learned brother whose judgment I have had the advantage of reading.

I also agree with my learned brother for the reasons given by him that there is no sufficient reason for differing from the findings of the District Judge that the authority was in fact given and the adoption in fact made.

The appeals are dismissed with costs. The case is one of great complexity and under rule 41 of the Appellate Side Rules, we grant a special fee of Rs. 3,000 to cover the Vakil's fees in both suits.

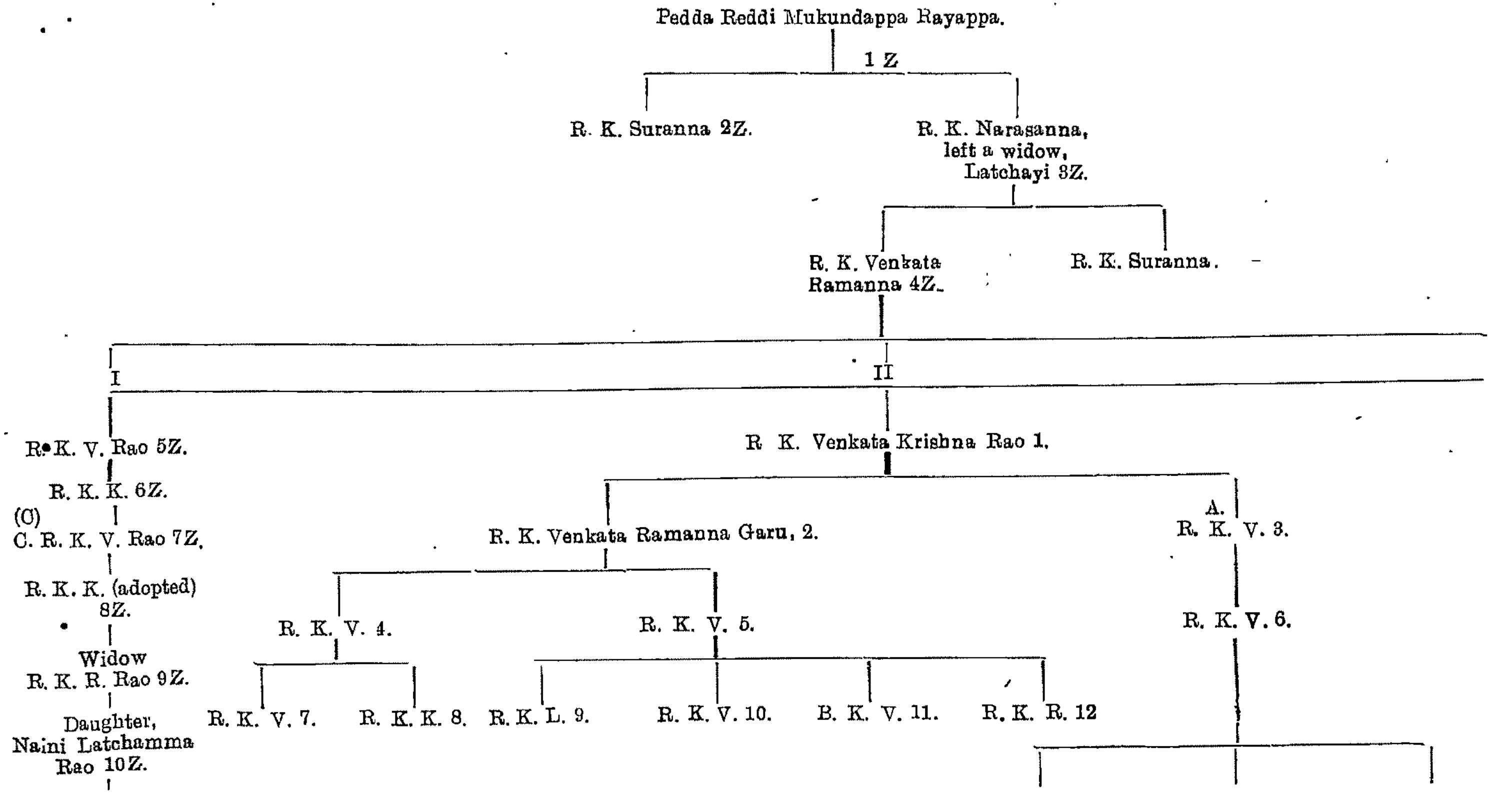
Sadasiva Aiyar, J.

Sadasiva Aiyar, J. :—Appeal No. 426 is against the decree in O. S. No. 56 of 1895 on the file of the District Court of Kistna sitting at Masulipatam. The connected Appeal No. 427 is against the decree passed in the earlier Suit O. S, No. 30 of 1893 filed in the Subordinate Judge's Court of Ellore but transferred to the file of the District Court abovementioned in 1895.

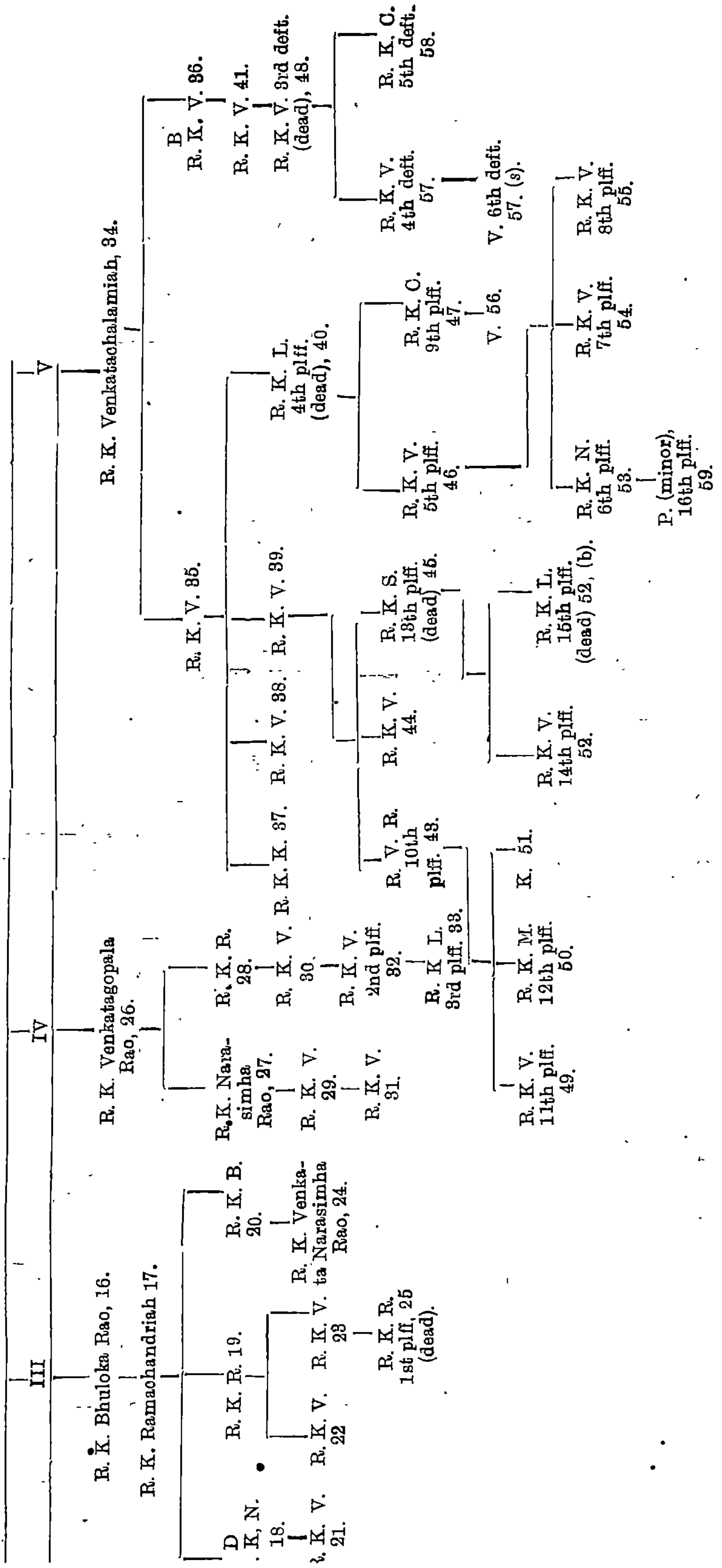
(To face page 167.)

GENEALOGICAL TREE OF THE KEESARA FAMILY, ZAMINDARS OF MUNAGALA ESTATE.

O. S. No. 45 of 1895 on the file of the District Court, Kistna.



Pedda Reddi Mukundappa Rayappa.
1 Z
R. K. Suranna 2Z.
R. K. Narasanna, left a widow, Latchayi 3Z.
R. K. Venkata Ramanna 4Z.
R. K. Suranna.
I
II
R. K. V. Rao 5Z.
R. K. K. 6Z.
(C)
C. R. K. V. Rao 7Z.
R. K. K. (adopted) 8Z.
Widow R. K. R. Rao 9Z.
Daughter, Naini Latchamma Rao 10Z.
R K. Venkata Krishna Rao 1.
R. K. Venkata Ramanna Garu, 2.
A.
R. K. V. 3.
R. K. V. 4.
R. K. V. 5.
R. K. V. 6.
R. K. V. 7.
R. K. K. 8.
R. K. L. 9.
R. K. V. 10.
B. K. V. 11.
R. K. R. 12


III
IV
V
R. K. Bhuloka Rao, 16.
R. K. Ramachandriah 17.
D
K. N.
18.
K. V.
21.
R. K. R. 19.
R. K. V.
22
R. K. V.
23
R. K. R.
1st plff. 25
(dead).
R. K. B.
20.
R. K. Venkata Narasimha
Rao, 24.
R. K. Venkatagopala
Rao, 26.
R. K. Narasimha
Rao, 27.
R. K. V.
29.
R. K. V.
31.
R. K. R.
28.
R. K. V.
30.
R. K. V.
2nd plff.
32.
R. K. L.
3rd plff. 33.
R. K. V.
11th plff.
49.
R. K. M.
12th plff.
50.
K. 51.
R. K. Venkatachalamiah, 34.
R. K. V. 35.
R. K. K. 37.
R. K. V. 38.
R. K. V. 39.
R. V. R.
10th
plff. 43.
R. K. V.
44.
R. K. S.
13th plff.
(dead) 45.
R. K. V.
14th plff.
52.
R. K. L.
15th plff.
(dead) 52, (b).
R. K. L.
4th plff.
(dead), 40.
R. K. V.
5th plff.
46.
R. K. C.
9th plff.
47.
V. 56.
R. K. N.
6th plff.
53.
P. (minor),
16th plff.
59.
R. K. V.
7th plff.
54.
R. K. V.
8th plff.
55.
B
R. K. V. 36.
R. K. V. 41.
R. K. V. 3rd deft.
(dead), 48.
R. K. V.
4th deft.
57.
V. 6th deft.
57. (s).
R. K. C.
5th deft.
58.

The earlier Suit 30 of 1893 was filed in November 1893 and the plaint is dated November 1893 and this earlier suit will be treated as the more important suit and the several parties will be referred to in this judgment by the numbers given to them in the pleadings in this suit as far as possible.

The suit has taken 25½ years from its inception before it could be decided by this Court. The delay has been extraordinary even for a heavy Indian Zamindari litigation in which great delay seems to be accepted as normal. The history of the suits up to April 1914 is given in paragraph 227 of the District Court's Judgment. The suit was brought by 13 plaintiffs belonging to the Keesara family residing at Sirapuram in the borders of the Kistna District adjoining Hyderabad territory against 5 defendants. The 1st defendant was the Court of Wards who have since gone out of the record owing to the 2nd defendant for whom they managed the suit property, namely, the Munagala Zamin estate, having become a major during the pendency of this litigation. The 2nd defendant is the Zamindar residing at Nadigudam near Sirapuram where the plaintiffs live. The defendants 3 to 5 (4th and 5th defendants being the sons of the 3rd defendant) are three other members of the Keesara family who were arrayed as defendants because they refused to join the 13 plaintiffs in bringing this suit.

It will be seen that the 2nd defendant is the principal defendant in the suit and he may be shortly called the defendant. As might be expected, some of the plaintiffs, namely, plaintiffs 1, 4, 6, and 7 have died during these 26 years and three additional plaintiffs (14 to 16) came in afterwards. The suit, shortly stated, was for recovery of possession of the Munagala Zamindari from the defendant. The suit was dismissed and the plaintiffs are the appellants before us. To understand the main allegations of the plaintiffs on which they based their claim, the following geneological table and certain indisputable facts might be referred to here.

It will be seen from the geneological tree (containing more than 60 names) that 10 persons (excluding the defendant) of whom 8 are males and 2 are females, have been marked and

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numbered separately (with red-ink lined circles round the numbers). These have been recognised as the Zamindars and the Zamindarnees of Munagala entitled to be addressed as " Rajagaru " and "Zamindar", while the remaining 50-odd persons numbered separately were treated as entitled to maintenance allowances called ".Bhootad." The fourth Rajah (V. Ramanna) had 5 sons the eldest of whom was the fifth Rajah, his 4 younger brothers being Nos. 1, 16, 26 and 34 in the geneological tree. It will be seen that the dignity and status of Rajah or Zamindar was held only by a single member of this Keesara family from the time of the earliest ancestor Mukundappa and that it descended in lineal primogeniture till the 2nd Kothandaramiah (Rajah No. 8). Then it descended to his widow the 9th Rajah Rukkamma Row and then to the tenth Rajahgaru who was his daughter Latchamma Rao. Exhibit A 1, a pedigree of the Keesara family prepared in 1824 and obtained from the Masulipatam Collector's Cutchery is a geneological tree which shows the first seven Zamindars marking them 1 to 7, the numerical figures being enclosed in yellow line circles. The 3rd Rajah was no doubt the younger brother of the second Rajah, but the 2nd Rajah's senior line became extinct and so the third Rajah came in. The 4th, 5th, 6th and 7th Rajahs came in as belonging to the eldest line though the 4th had a younger brother, the 5th had 4 younger brothers, the 6th had 4 uncles and the 7th had several seniors in age in the junior four branches when they respectively succeeded to the Purgana Estate.

The first Rajah of this family (Mukundappa) flourished about the end of the 17th century and the beginning of the 18th century as is shown by Exhibits C and C2. Exhibit IX is a communication to Mukundappa addressing him as "the most excellent of his contemporaries". It is dated 1693. A Military General commanding the forces of the Emperor Alamgir (Aurangazebe) tells Mukundappa in Exhibit IX "we are quickly starting, and coming to punish the rebel Asway Rao. You should come *with your army* ; you should pay homage so that the Imperial Government may prosper and be honoured. You should come without entertaining doubt in respect of any matter and be honoured." Thus in 1693, though Mukundappa had then an elder brother and a younger brother (see Exhibits C and C2), he seems to have been recognised as the influential head of an army, a sort of petty military chief bound to assist the Emperor Aurangazebe. The Munagala Estate belonged to an ancient Reddi family and was part of the Mogul territory till 1755. It was held by members of the Garlapati Reddi family till 1690. As pointed out in paragraph 25 of the District Court's judgment, Reddis at Munagala seem to have been recognised as chiefs even from 1300 A. D. The line of the Garlapati Reddis became extinct about 1688 and the daughter-in-law of the last male-holder, Subadramma, transferred the Munagala Estate and the Desagiri or Desmuk status (which her father-in-law's family had enjoyed) to her brothers of the Keesara family one of whom was Mukundappa. This was in 1690 (See Exhibit C). As we have seen, three years after this, in 1693, Mukundappa is addressed as Zamindar in Exhibit IX and asked to assist with his army the General of the Delhi Emperor. The residence of the Munagala Chief was surrounded by mud forts. Desmuk means a principal, Police and Revenue Officer of a District and it is well-known that many of the Desmuks in Central India gradually claimed and acquired semi-sovereign powers and many of them called themselves not only Zamindars but Rajahs. When Subhadramma transferred her Zamindari of Munagala in 1690 to her brothers, she seems to have obtained the consent of several Sirkar officers, and influential men, about 70 persons having signed the Mahazir at the foot of Exhibit C, giving their approval to her act. As said in Grant's Political Survey, the transfer of such military estates seemed to require the consent of the people and it no doubt also required the consent of the ruling power before it could be recognised. I think I am safe in presuming that before 1693 when Exhibit IX was addressed to Mukundappa, he had been recognised by the ruling power as the Desmuk or chief of the ancient Munagala Purgana Zamindari though his sister executed Exhibit C in favour of all her three brothers. We do not hear of either of his two brothers enjoying or claiming any interest in the Munagala Estate, though their names appear tn Exhibits C and C2.

On the death of Mukundappa (the first Keesara Rajahgar) which was in some year after 1705, his eldest son Sooranna became the second Rajah. On his death without issue his younger brother, Narasanna became the third Rajah. He seems to have died about 1760 or so leaving two sons Venkatramanna and Sooranna and a widow Latchayee. The widow Latchayee is treated as the Zamindarini in Exhibit X, dated1766, evidently because her eldest son who is entered as the fourth Rajah in Exhibit A1 was then a minor. She is stated to be the mistress of a force armed with 206 matchlocks and 200 pikes in constant pay, the pikes capable of being increased to 300 in case of troubles. Then in 1770 the fourth Zamindar got the cowle or sunnad (Exhibits D and D1) for the District of Munagala, the Munagala Zemindari Estate having become part of the Company's territory about 1766.

The fourth Zamindar was succeeded after 1774 by the eldest of his five sons who became the fifth Zemindar. He died on 9th November 1802 while the Mulkath Isthimirar Sunnad was being Prepared in his favour. The sunnad Exhibit XI was therefore given to his adopted son Kothandaramiah No. 1 who succeeded him to the Purgana estate as 6th Rajahgar though (as I said already) his 4 uncles, all elder in age to him (he was only 22 then) were alive. (See asterisk note in Exhibit XIII (*a*) as to his four uncles). The Collector in Exhibit XII dated 21st January 1803 says: "The deceased" (5th Rajah) "has left one son Kothanda Ramiah aged about 22 years *to whose succession to his father's estate I perceive no objection.* The deceased's brother Bhuloka Rao is alive and will superintend the conduct of his nephew. Gumastah however has been sent to receive charge of the country until the orders of the Board," (that is, the Board of Revenue) "are received." In Exhibit XII(*a*) also, the words are that the Sunnad Isthimirar may be sent for delivery after alteration of the name of the late Desmuk into the name of the late Desmuk's son in the event of His Lordship in Council *approving of his succession to his father's estate.* Exhibit XII(*b*) also recommends Kothandaramiah to be recognised as *successor.*

Rajah No. 6 Kothandaramiah died in the beginning of 1814. He left an only son Narasimha Rao aged 13. "From information it appears that the surviving cousin of the late Zamindar declared the son aged 13 years of the deceased to be *the rightful inheritor* and I therefore appointed an ameen to take charge of the Zamindari and wrote a letter to the other relatives, a translation of which as well as of their replies is herewith transmitted. From the latter paper the Board will perceive that the *right of the boy so far from being disputed is fully acknowledged by the cousins of Kothandaramiah.*" "I know not therefore whether your Board would not better consult the interests of the boy etc." (See Exhibit XIII dated April 1814). The reply of the cousins referred to in Exhibit XIII is Exhibit XIII (a) and is in my opinion a very important document. It is signed by No. 34 (the surviving youngest son of the 5 sons of No. 4 Rajah) and also by Nos. 2, 17, and 27 in the geneological tree who are evidently the heads of the 2nd, 3rd and 4th of the five branches. In this Exhibit XIII (a), a geneological tree is given and there is a note against Kothandaramiah that although this young man was younger than his four uncles, yet the Zamindari was bestowed upon him "*according to the former usage of their Samasthanam*" and then it is said "*Although Venkatanarasimha Rao*" (that is the boy of 13) "the son of the late Kothandaramiah *is younger than us, yet the Zamindari should be in his name according to the succession of the first branch of the family.* The right of the Zamindari and the cowle granted by the Company should therefore be vested in him, and until he gains sufficient knowledge we will take care ourselves to pay the circar kists. We will manage all the affairs of the estate *for him* etc." Accordingly, the Board of Revenue took charge of the estate in 1814 on behalf of the minor Zamindar Kothandaramiah, see Exhibit XIII (*b*). I need hardly say that unless the proprietary right to the Zamindari was considered to be vested solely in the minor, the Board of Revenue under the Regulation V of 1804 could not lawfully take possession. It was evidently because the other 4 branches admitted in Exhibit XIII (*a*) that according to the usage of the Samasthanam, succession by lineal primogeniture obtained so far as the proprietary right to the Zamindari of Munagala was concerned, the Board of Revenue considered that they had jurisdiction to take possession, to appoint a manager and do

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the other acts mentioned in Regulation V of 1804 till the minor proprietor attained his majority (that is, 18 years of age), (see Sections 3, 4, 8, 9, 10, 19, etc., of Regulation V of 1804.) Exhibit XIII (*d*) shows that a manager was appointed to the estate and also a guardian for the minor. Exhibits XIV (*e*) and XIV (*d*) are very important documents. They show that the Zamindari was handed to the 7th Rajah Venkata Narasimha Rao in 1818 *with Rs.* 3,000 *odd outstanding in the* treasury "with all due solemnity" and that about May 1818 just before he attained majority (that is the age of 18 years) Rs. 4,000 was spent for his nuptials. This 7th Rajah Venkata Narasimah Rao who was so put in possession of the Zamindari by the Court of Wards on his attaining majority in 1818 died in August 1835. During this period, there was prepared the pedigree Exhibit A 1. of 1824, distinguishing the seven Keesaras who had succeeded to the Zamindari in lineal succession from the members of the other four branches who did not so succeed. Then there is Exhibit F of the same year which consists of two paragraphs 69 and 70 out of a long report of Mr. Roberts relating to all the Zamindaris in the Kistna District. These two paragraphs relate to this Munagala Zamindari. The following are the important passages in Exhibit F :— " Venkata Narasimha Rao, the present Zamindar, is the sixth person from the said Mukundappa, *although there were second sons in every genaration of this family yet it appears that no division of the Taluk was ever made between them, but the profits derived from it were enjoyed by all consisting of five families reserving* only to the head *of their family the title of Deshmuk or Zamindar* " "The Office of Deshmuk was abolished in 1802."

On the 6th August 1835, the 7th Rajah made his will, Exhibit H2, in favour of his adopted son, Kothandaramiah No. 2, the 8th Zamindar as follows :—

[His lordship after setting out the terms of the will constituting the adopted son, heir to the Zemindary refers to the period of the Rajah's minority and proceeds.]

He therefore attained his majority on some day between 7th August 1848 and 5th August 1849. On the 14th April 1849, the Rajah as the second signatory and 9 other persons belonging to the Keesara family executed the Samakhya, (agreement), Exhibit K, in the presence of the Taluk Tahsildar.

[The judgment then sets out the circumstances under which Exhibit K was executed.]

Now let us see what the arrangement itself is. It clubs the Munagala Zamindari consisting of about 38 villages situated within the Company's Jurisdiction with 3 small taluks containing about 11 villages in the Nizam's dominions belonging to the Keesara family. The income from the British Indian villages was then about Rs. 10,000 annually, whereas the income from the Native State villages seems to have been about Rs. 600 to Rs. 800 (See Exhibits XXIV (c) and XXXI and the evidence of D. W. 15). The document Exhibit K says that the management of the total income for the 15 years between 1st July 1849 and 1st July 1864 should be as follows :—

(1) From the 1st July 1849 to 1st July 1854 the Rajah Zamindar Kothandaramiah of Munagala and Venkatakrishniah of the 3rd branch (No. 15 in the geneological tree) were to manage the joint income ;

(2) From the 1st July 1854 to 1st July 1859 the Rajah Kothandaramiah and one other man to be selected from six of the signatories to manage ; and

(3) From 1st July 1859 to 30th June 1864 the Zamindar Kothandramiah again and one person to be selected by the three remaining signatories of Exhibit K to manage the total income. The document provides that all debts incurred till then should be accepted as payable by these three sets of two managers in each set (the Zamindar being always one of the two managers) so that the Sowcar was quite safe. Rs. 2,750 was to be set apart for the maintenance of the five branches of the family at Rs. 550 for each branch. Nothing is said as to what was to become after the expiry of the 15 years' term but evidently the parties thought that within that period, the debts of the Sowcar would be wiped out.

Disputes seem to have arisen at once and then the young Zamindar seems to have agreed to allow the four branches each to enjoy one or two villages for *Bhootad*, the income of each set of villages being estimated to amount approximately to Rs. 550.

* * * *

While these disputes were going on this 8th Zamindar Kothandaramiah No. 2 died on the 22nd November 1854 (See. Exhibit Rl). Then the Collector wrote Exhibit R to the Commissioner for Northern Circars. I shall extract the following passages :—"It appears that Gopamma the mother of the late Zamindar and Rukkamma his widow aged respectively 45 and 21 years are at peace with one another and willing and *able to manage the estate* with the assistance of such male members of the family and old servants as have been all along in their interest......The only offspring of the deceased Zamindar is a daughter reported to be five years old......With regard to the debts of the estate it appears that the late Zamindar had in his life-time made arrangements with Gonaguntala Seetayya, a Sowcar of Jaggayyapet by making over to him the usufruct of certain villages both for the liquidation of the debt and for the annual payment of the whole peishcush of the estate."

"With regard to the estate itself, I see no objection to its release from attachment and return of the several villages to those parties under whose enjoyment they were at the time of the death of the late Zamindar that portion which was in the hands of the Zamindar being given up to the mother and widow."

"*The opinion of the Pundits of the Sudder Adalet appears to decide that under the Hindu Law the estate of a person divided from his co-heirs who dies leaving no male heirs devolves first, upon his widow and then upon his daughter.*" This was in January 1855. Evidently in accordance with the above opinion of Pundits and treating the Munagala Zamindari as impartible estate which belonged to Kothandaramiah No. 2 who was divided in interest from the other four branches of the family (see the decision of the Privy Council in *Tara Kumari* v. *Chaturbhuj Narayan Singh* [1] the estate was put into the possession of Rukkamma, the widow of Kothandaramiah in 1855 itself. Thereupon the members of the other four families seem to have brought five suits O. S. Nos. 5 to 9 of 1857. We have got some of the records (Exhibits B, XIX, W and WI) in two of those suits. Exhibit B is the plaint in O. S. 9 of 1857. The plaintiffs in that suit belong to one *sub-*

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1. (1915) I. L. R. 42 Cal. 1179=29 M. L. J. 371. (P. C.)

branch out of the two *sub-branches* of one of the five main branches of the family. In the plaint, it is alleged that the Nizam's dominion villages are in the enjoyment of the 4 branches alone and not of the senior branch in whose name the Munagala Zamindary proprietorship is registered. The plaintiffs sue *for their* one-tenth share in the 38 villages yielding an income of about Rs. 13,500 gross and Rs. 9,000 net. The last sentence in the plaint says that even as regards the one-fifth share of the senior branch, the plaintiffs and the other members of the other four families are the next *reversioners* as the senior line became extinct for want of male issue. (The widow Rukkamma is impliedly acknowledged to be the widow of a divided member entitled to inherit his estate. In Exhibit XIX, Rukkamma Rao gave a "rejoinder" written statement in which she denied that the other four branches had any share in the proprietorship of the Munagala Zamindary and stated that the other four branches had admitted long ago before the Collector that they were entitled only to Bhootad (maintenance allowances), that the plaintiffs and others have acknowledged that they were living separately, that "when my husband has executed a will in accordance with the Hindu law, kinsmen who are not entitled have no right to say that it is contrary to law," that the words "Rajah" and "Zamindar" apply only to the "Rajah" who is exercising overlordship" and that the plaintiffs owing to lack of such ownership cannot get the titles of Rajah and Zamindar. In fact, the divided status was clearly admitted by both sides and the only question was whether the estate of Munagala was a partible estate or an impartible estate. Then the widow who had in the meanwhile pretended to have adopted a boy, one of her husband's cousins compromised all the suits, the principal terms of that compromise being recited in the judgment, Exhibit W, dated March 1858. The terms are that though the other four families were receiving only each Rs. 400 for their "maintenance" allowance till then, (the Rs. 550 mentioned in Exhibit K had been reduced to Rs. 400 under Exhibit T. Series in 1857) it was agreed that the Rs. 400 should be increased to Rs. 500 that the plaintiffs in Suit 7 of 1857 (representing one of the two sub-branches of one of the five families) was entitled to Rs. 250 maintenance accordingly, that the widow should spend Rs. 500 for the maintenance of her own first branch, that she should meet the other usual expenses including festivals of deities, establishment charges and so on and that she *should deposit the savings* " till the age of 18 years comes to the adopted son" to the credit of the Munagala Purgana. The original razinamah itself is not before us. The recital of the terms in paragraph 5 of Exhibit W leaves it rather obscure as to whether the other four families had any share in the proprietorship of the Zamindari though the maintenance allowance of each of the branches, namely Rs. 500, was the same amount as what the widow Rukkamma herself was to take out of the income for maintenance of the senior branch. The provision however that the savings should all be with her till her alleged adopted son attains the age of 18 years and that the whole management of the Zamindari should remain with her seems to negative the idea that the other four divided branches had any claim on those savings or any claim on the Purgana except that of obtaining maintenance out of its income. It seems to follow that they had no proprietorship in the Zamindari though they might have been co-sharers in the sense in which before *Sartaj Kuari* v. *Deoraj Kuari* [1] persons entitled by custom to maintenance allowance from a Zamindari Estate as being descended in junior lines from the common ancestor were loosely talked of as co-sharers though there was really no co-parcenery in the strict sense and no right to claim partition. The other four branches thus did not press their claim to a division of the Zamindari and abandoned their claim to recover past mesne profits which they were entitled to get if they were really proprietory divided co-sharers with Rukkamma and her husband (See prayer in Exhibit B, the plaint in which such a claim for mesne profits is made). In the compromise, shares in the savings out of the whole income which may be received by the widow Rukkamma till the alleged adopted son attained majority are not expressly recognised or reserved in favour of the 4 divided branches. The reasonable construction of the compromise transaction seems to be that the members of the other four divided branches admitted the Munagala Zamindari to be a separate and (not a joint) impartible estate which had descended to the widow of (and then to the son alleged to have been adopted by her to) the previous Zamindar Kothandaramiah. The fact that the full proprietorship was exercised by Rukkamma Rao at once is shown by Exhibits III and III (*a*), she, as Zamindarni, having taken steps to dispossess her husband's gnatis (who were enjoying some of the lands as ryots in the Estate) of their ryoti lands for their non-payment of the rent or cist, due to her as Zamindarni. (One of the plaintiffs as plaintiff's witness admits that she dispossessed them for two years.)

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[1] (1888) I. L. R. 10 All. 272=15 I. A. 51. (P. C.)

After this compromise in 1858, Rukkamma Rao treated the estate as her own exclusive property though her husband's divided kinsmen went on intriguing against her. This is what one usually expects where a widow succeeds to an impartible estate and male agnates of her husband are alive. Exhibit XXI shows that in 1865 the published notices in the District Gazette that her husband's gnatis were trying to cause loss to her estate. Shortly before her death, on the 10th May 1868, she wrote, letter Exhibit XXII to the District Collector accusing her husband's gnatis of having poisoned her and stating that she has made over the Zamin estate belonging to her "according to Dharma Sastra " to her daugher Latchamma. It will be seen that she ignored the adoption referred to in Exhibit W. She seems to have died the very next day at 4 P. M. The alleged adopted son Venkata Raghava Rao had filed suit No. 2 of 1868 in the Civil Court of Guntur District for recovering the Zamin right.

[The Judgment then deals with the details of the said suit.]

The daughter Latchamma who became the 10th Rajagaru Zamindar having succeeded against the alleged adopted son of her mother by this judgment of the High Court, Exhibit XX, began to manage the estate very ably and gradually raised the income from about Rs. 10,000 to 50,000 or 60,000.

[The Judgment next deals with matters not material to this report.]

Meanwhile Latchamma Rao's husband who was himself a Deshmuki living at Thorur in the Nizam's territory (about 100 miles distant from Nandigoodem) died on 15th May 1875.

About a week before his death he went to a village called Vavilala (about 8 miles distant from his ancestral village of Thorur) for treatment by a native physician there. He had been suffering for about 18 months from rheumatism and rheumatic fever, and dropsical symptoms had set in accompained by swellings in hands and legs. On the 10th May 1875 at Vavilala his wife Latchamma being then at Thorur he executed in her favour the deed of authority, Exhibit XXV, attested by four witnesses including his own natural father of the Rapaka family he having been himself adopted to the Nayini family. Of the four attestors one is a Deshmuki and two are Desapandias or karnams. The 4th is the executant's purohit and the writer is Seeniah whose brother was employed under him. On the 11th May 1875, he reported by Exhibit XXVII that he had given on the previous day authority to his wife to adopt. This report was sent to the Aval Talukdar who corresponds in the Nizam's dominions to the District Collector. Then he went back to Thorur where his wife was staying and reached the place about 8 A. M. on the 15th May 1875, gave into her hands Exhibit XXV (the authority to adopt) and died the same day at about 12 noon.

[The Judgment then deals with the recognition of Lutchamma Rao's right to her inherited properties by the Government and refers to the adoption of the defendant on 19-11-1883 by Lutchamma Rao and the execution of a deed of adoption Exh. XXIX (*d*) by her.]

It will be seen that from the 11th May 1868 when Rukkamma Rao died till 1883 when she made this adoption Latchamma Rao had been enjoying the Munagala Zamindari as heir of her father and as an impartible undivided and separated Zamindari estate for more than 15 years. Her father's Keesara kinsmen could not enjoy peace of mind when a woman who had become by marriage a Nayini was enjoying the estate. Though they had abandoned in 1858 their claim to treat it as partible as a "hopeless" contention (see Exhibits W and XX) they seem to have in February 1879 (just before 12 years elapsed from Latchamma's taking possession) tried to induce the Board of Revenue to dispossess Latchamma and give the Zamindari to them but they failed (see Exhibit VII (*b*)). Then in June 1880 (after she had enjoyed for 12 years) they sent the Urzee, Exhibit VII(*c*), to Government directly. Paragraph 8 of this petition admits that the Zamindari was acquired by a progenitor from the Nizam 200 years ago. This shows that it is an ancient Zamindari. In paragraph 13 they admitted that the family became divided, that the Munagala Zamindari should be 'governed' (that is, as if it was a chieftain's estate) by the "first family heir" and that maintenance should be given to the divided junior members. Paragraphs 24 and 25 and the 1st para of 30 are as follow : " 24. The reason why an ancient Zamindari cannot be partitioned is, that by partition it goes to pieces, becomes completely ruined, and for some reason it will become destroyed or alienated, etc. that is, it means that a Zamindari is always an undivided estate ". " 25 While there are male members in the family of the propositus, and when it is clear that it cannot go to female issue or be alienated, the Acting Collector of Kistna District by a mistake made over to her the right to the ancient Samasthanam estate which ought to belong to us. Therefore the respect and name of our family became decreased and is destroyed."

"30. The said Latchamma by her acts commenced to cause loss to the estate. The act of giving three villages to a woman named Chinna Butchakka in the 2nd family is one which is outside the scope of her power. Her strength lies in the advice of her servants. She is behaving in an improper manner but not in a virtuous manner. For these reasons we are entitled by " Dharma Sastra" to obstruct her management and to attempt to remove her." The above seems to contain a clearer admission that this was an impartible estate, that Latchamma's father's gnatis were all divided and that Latchamma had been strong enough to enjoy the property as exclusive heir of her father after her mother's death for more than 12 years notwithstanding that these people were trying to obstruct her management and attempting to remove her. They made a further attempt in 1882 by petitions (Exhibits VII (*d*) and (*e*) to the Collector and the Board of Revenue to disposess her.

It was in these petitions of 1882 that they set up for the first time after 1858 that the Zamindari was joint property, notwithstanding that they refer in paragraph 9 of Exhibit

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VII (*d*) to their former Urjee of 1880 which acknowledged the Zamindari to be a separate impartible estate. In fact between the date of Exhibit VII (*c*) (June 1880) and the dates of Exhibits VII (*d*) and (*e*) (1882) they seem to have been advised to reassert their hopeless claim of 1857 which they had abandoned in 1858. In May 1882, Rajah Latchamma Rao wrote Exhibit KKK setting out all the facts and stating that from 1855 for 27 years she and her mother as heirs of her father had been in enjoyment (to the knowledge of her father's agnates) of the separate property of their father and that her fathers' agnates had not only no right at any time but their alleged claims as co-sharers were hopelessly barred. The Collector in the same year 1882 sent to the plaintiffs the order Exhibit VII (*f*) directing them to go to the Civil Court if they had any grievances and not to obstruct Latchamma Rao's enjoyment which had continued for 14 years. I shall at this stage give my conclusions on the two questions, namely, (*a*) whether the Munagala Zamindari was and is an impartible estate (*b*) whether the plaintiff's claim to treat it as a partible estate in which they had rights as co-sharers became barred and when it so became barred. On the first question, numerous authorities were quoted on both sides. I do not think it necessary to consider them elaborately. It is in my opinion a question of fact to be decided on the whole of the evidence in each case. No one circumstance is conclusive. Whether it was an ancient Zamindari is one circumstance to be considered. Whether it was in the nature of a military tenure is another circumstance. Whether there had been a confiscation and regrant, whether the British Government divided the estate and re-granted the divided portions to strangers or to junior members, whether it had passed by sale or gift from the family which first held it to another family are all circumstances to be considered and the final conclusion must rest on the evidence taken as a whole. The course of descent for several generations in the line of primogeniture without partition notwithstanding that there were agnates of the reigning Zamindar belonging to junior branches, is of course the most important consideration though even that fact may not be taken as conclusive. The inner conviction of the members of the family as shown by their conduct and their declarations from time to time, especially when there was no dispute is of course a very valuable test. When such declarations were made by the members of the junior branches against their own interests, they are, of course, of very great value. What they tried to put foward when or after an actual litigation had commenced is of very little value though their subsequent conduct in giving up 'hopeless' contentions is of much value. In this case, I have come to the clear conclusion on the evidence as a whole that the District judge's view based mainly on the important documentary evidence from 1687 to 1882 above set out is correct, namely, that the Munagala Zamindari has been always an impartible Zamindari which has come down in the descent of lineal primogeniture and that it was the separate property of Rukkamma's husband at his death. He had, no doubt, agreed in Exhibit K that its profits should be mixed up with the relatively very small profits of the divied Hyderabad Deshmuk property belonging to himself and his agnate relations and be held in common for a period of 15 years from 1849 for the purpose of discharging debts incurred during his minority by his natural father and by his other agnates but the ownership of the Munagala Zamindari remained however vested in him separately, there being nothing in Exhibit K which made that estate also partible or divisible property, the arrangement in Exhibit K having been modified even in his life-time and having ceased to have any force at his death which took place long before the expiry of the 15 years' term mentioned in it. It was superseded at once by other arrangements by which the enjoyment of some villages was given to the 4 branches for their maintenance and the enjoyment of two villages was given to the Sowcar for clearing off his debts. By reason of the decision in Exhibits W, and W1, and of the enjoyment of Rukkamma and Latchamma, the property became vested in them as heirs to the separate estate of Rukkamma's husband. The fact also that the Court of Wards came in first in 1814 and then again during Rukkamma's husband's minority is wholly against the alleged co-parcenery right of the agnates of the other 4 branches, the Court of Wards having no power to take possession of an estate if it was the property of an undivided family unless all its co-parceners are disqualified by minority etc., (see section 17 of Madras Act I of 1902, Court of wards Act, which expressly enacts what was implied in the former Regulation V of 1804 and what was followed in practice by the Court of Wards even before Act I of 1902 was passed. The appointment of managers and guardians can be made under this Act only if the disqualified proprietor is the sole proprietor of the estate taken charge of or if all the co-parcenery proprietors were disqualified). The vague reference in Collector Robert's report, Exhibit F, to enjoyment by all the branches (though the eldest in the senior branch alone is admitted even in it to be the sole Zamindar) and the reference in some other documents to a sort of co-parcenery among the five branches are not in my opinion of much value as it is well known that prior to the well-known decision in *Sartaj Kuari* v. *Deoraj Kuari* [1] followed in the *Pittapuram case,* there was an erroneous idea that notwithstanding that an estate was impartible (and the agnates of the junior branches cannot therefore sue for partition) they could be called undivided co-parceners and were so styled even in judicial pronouncements (see the way in which this contention about their right as co-parceners and co-sharers was stated as following from judgments of the Privy Coucil itself by the Allahabad High Court at page 277 of I. L. R. 10 All. 272 that Court styling the right of the junior branches to be "dormant co-ownership—see also 9 Madras Law Journal report of the Pittapur case where it was definitely met and negatived by their Lordships both during the argument and in the judgment notwithstanding that Mr. Mayne strenuously contended that at least, the long course of Madras decisions which prohibited alienation by a Zamindar enjoying an impartible estate, the prohibition being based on the theory of "dormant co-ownership" in his agnates, may not be disturbed so far as Madras Estates were concerned.) Even if Exhibit F be construed as an admission by Rukkamma's husband that the Munagala Zamindari was co-parcenery property, the facts that Rukkamma and her daughter inherited it asserting that it was Kothandramiah's separate property and that they enjoyed it as such for 25 years continuously, their possession being statedly adverse and exclusive created a bar which destroyed the rights of her father's divided agnates and vested in Rukkamma and Latchamma prescriptive rights in the estate(see Freeman on Cotenancy, sections 228 to 230.) In *Vengamma* v. *Chelamayya*[1] it was held that a Hindu widow could obtain by prescription a woman's—estate in property as if it was the separate property of her husband, if the title she asserted (during the time when prescription was maturing) was the title of a widow holding the property as representative of her husband's estate(see also *Bapanayya* v. *Peddichalamaiya*, [2].) I am unable to accept the contention of the plaintiffs that the fact that Rajah Latchamma Rao and Rajah Rukkamma were paying them allowances (Bhootad—maintenance) in accordance with the decree Exhibit W prevented the enjoyment of the ladies being adverse to their claims to be co-sharers thereof. (Nor do I think it necessary to notice the equally untenable contention on the defendant's side that because Latchamma Rao entered in her account books the said payments towards maintenance as presents, she prescribed for a higher estate than that of the daughter of a separate owner who had inherited as his heir.) That even the plaintiffs in this case considered their case of partibility and co-parcenary difficult to sustain is shown by their setting up one of them to bring the second suit on the basis of the estate being a separate impartible estate and also by their unscrupulous law agents having created for them documents Exhibits G. L. series, GG series, and entries in Exhibits AA4, and AA5. I generally concur with the reasons given by the learned District Judge in paragraphs 89, 95, the last sentence in paragraph 129 and in paragraphs 143 to 151 and I agree for those reasons in holding that these are false documents.

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[1] (1888) I. L. R. 10 All. 272 (P.C.)

I shall now consider the issues 7 to 10 in this case which relate to the questions connected with the fact of the defendant's adoption by Latchamma and of the authority to adopt alleged to have been given to Latchamma by her husband and of its validity. The 6th issue is partly based upon the defendant's allegation that besides the written authority, Exhibit XXV, given by Latchamma's husband, he had also given her an oral authority to adopt. That oral authority was however found against by the learned District Judge. I entirely agree with him as only two witnesses [Exhibits XLII (*e*) and XLI (*aa*)] speak to this oral will which is alleged to have been given at Thorur before Latchamma's husband went to the small village of Vavilala and it is quite unsafe to act on the oral evidence of such ordinary witnesses in an important and heavy case like this.

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[1] (1912) I. L. R. 36 M. 484=23 M. L. J. 168.

[2] (1898) 9 M. L. J. 33.

The other part of 6th issue relates to the genuineness of the alleged written authority Exhibit XXV. [His Lordship then discusses the evidence on the point.]

The genuineness of Exhibit XXV being in my opinion beyond doubt, its validity and also its admissibility in evidence are attacked on the ground that it was not properly registered. It was as a matter of fact registered after a very elaborate enquiry by the acting Sub-Registrar of Bezvada in December 1892. It was presented to him for registration on the 20th August 1892 by Nayini Raghava Reddi (the defendant's natural father), the defendant then being a minor about 14 years old. The registration is however contended to be illegal on two grounds. (1) Firstly that this authority to adopt executed out of British India in Thorur was not presented for registration in Bezwada within 4 months after its first arrival in British India as required by section 26 clause (*b*) of the Registration Act of 1877 ; secondly that it was not presented for registration by any of the three persons who are entitled to present the same under section 40 (2) of the Registration Act, namely, the donor of the authority to adopt (who died in 1875), or the donee Latchamma who died in 1892 or the adopted son (the defend ant) but by the defendant's natural father who was not even his lawful guardian. For the defendant it was argued (*a*) that Exhibit XXV having been executed in the Nizam's dominions by Nayini Venkataramayya domiciled in the Nizam's territory to his wife Latchamma who of course was also domiciled in that territory like her husband, section 17 of the Indian Registration Act, clause 3, which makes the authority to adopt a son compulsorily registerable did not apply at all to Exhibit XXV as section 17, clause 3 must according to reasonable rules of interpretation be confined to authorities given by a person domiciled in British

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India. (*b1*) Even if section 17 applied to this authority, it as a matter of fact came into British India only on 22nd April 1892 within 4 months before it was presented for registration on 20th August. (*b2*) The time limit of 4 months in sections 23 and 26 does not apply to authority to adopt when presented for registration under section 41 (2) by a person other than the donor of the authority. (*c*) Even if the Sub-Registrar erroneously thought that it was presented within 4 months of its arrival in British India; once he effected the registration his irregularity in having registered it was cured by section 87 of the Registration Act. (*d*) The defendant having been a minor the presentation by the guardian for him in his interest is allowed by law. (*e*) His natural father who was his father's nearest agnate male relation and was also his *de facto* guardian was entitled to present it and even though the defendant had been adopted away, his natural father was entitled in law to act as his guardian in all the steps necessary to be taken to have the adoption established and hence, the natural father's presentation on behalf of the defendant is a proper presentation.

On the question of fact (that is, whether the document came into British India at any time more than four months before its presentation for registration in August 1892), I agree with the District Judge in answering the question in the negative.

[His Lordship then discusses the evidence and proceeds.] In the result, I find as a fact that the document was brought into British India only on the 22nd April 1892 about a month after Latchamma's death.

On this finding it is unnecessary to consider the other legal questions argued on both sides except the question of the validity of the presentment for registration by the defendant's natural father assuming that registration was necessary to make it admissible and to give it validity. On this last question, namely, whether section 17, clause 3, applies at all to a document executed out of British India by persons domiciled out of British India, I am inclined to agree with the contention of the learned Advocate General that section 17 of the Registration Act which makes compulsorily registerable certain documents (compulsorily registerable documents being under section 49 incapable of affecting immoveable property or conferring power to adopt or of being received in evidence unless so registered) was intended to deal only (*a*) with documents relating to immoveable property situate in British India (clause 1 of section 17) and (*b*) with authorities to adopt executed by a person domiciled in British India (clause 3.) As regards the concession given in section 26 to have certain documents including an authority to adopt executed out of British India presented for registration within 4 months after it is brought into British India, it was in my opinion intended to meet the case of a person domiciled in British India travelling abroad (in Europe or America etc., or even in a Native State on a pilgrimage) and suddenly finding himself in a bad state of health, executing an authority to adopt in favour of his wife to be used by her. The observations in some English cases (*Cooke* v. *Charles A Vogeler Co,*[1] *Dulaney* v. *Merry & Son*[2] and *Swifte* v. *Attorney General for Ireland*[3]) seem to me to establish that the legislature could not have intended to make the validity of a power to adopt executed in a Native State by a person domiciled within the Native State depend upon its being registered in British India or even its admissibility in evidence without registration depend upon its having been registered in British India within 4 months of its arrival therein. I shall take a case to illustrate what I mean. A, domiciled in the Nizam's territory and holding large properties therein and owning no property in British India, gives his wife authority to adopt in 1875 and dies at once. His wife adopts accordingly a son B in 1875. Two years afterwards she starts on a pilgrimage to Benares, Rameswaram and other places and carries with her the box containing all her papers including the authority to adopt and returns to her native place after the pilgrimage in 1880. Then in 1900 her husband's brother C who had settled in Madras as a trader in 1885 dies in Madras leaving no nearer heir than his brother's adopted son B residing in the Nizam's territory. Can it be argued that the authority to adopt given by A (which validates the adoption of B under the Hindu Law) cannot be proved and is not valid because it was in the adoptive mother's luggage box

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[1] (1901) A. C. 102.

[2] (1901) 1 Q. B. 536.

[3] (1912) A. C. 276.

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forming part of her luggage during her pilgrimages in 1877 and had not been registered in British India within 4 months of that date ? Is a person to lose his right as heir because he could not prophesy that 23 years after his adoptive father gave his adoptive mother authority to adopt in the Nizam's dominions, he might have to prove and establish the adoption in a British Indian Court ? I think that if the status of a person as an adopted son has been established as valid in the domicile of the adoptive parents, that adoption must be held valid according to the principles of International Law in all other places where there is no express statute law to the contrary effect. In Maxwell on Interpretation of Statutes, Chapter VI, the whole question is considered. I shall quote a few passages therefrom. A State "has a right to impose its legislation on its subjects—natural or naturalized in every part of the world." "On such matters as personal status or capacity it is understood always to do so." "In the absence of an intention clearly expressd or to be inferred either from its language or from the object or subject matter, or history of the enactment, the presumption is that Parliament does not design its statutes to operate on them" (that is, even on its own subjects) "beyond the territorial limits of the United Kingdom. They are therefore to be read usually as if words to that effect had been inserted in them." "Every statute should be so interpreted and applied as not to be inconsistent with the comity of nations or with the established rules of international law. If therefore the legislature intended to exceed its jurisdiction, it must express its intention with irresistible clearness to induce a Court to believe that it entertained it. All general terms must be narrowed in construction to avoid it." "In general, statutes, must be understood as applying *to those only who owe obedience to the Legislature which enacts them* * * that is its own subjects * * but that as regards aliens resident abroad, the Legislature has no concern to protect their interests, *any more than it has a legitimate power to control their rights.*"

I shall now deal with the remaining contentions on the question of the validity of the registration. I am unable to agree with the learned Advocate General that the plain words of section 23, that all documents other than wills ought to be presented for registration to the proper officer within four months subject to section 26 do not apply to authorities to adopt and that the language of section 41, clause 2, overrides the language of section 23 and that if the conditions mentioned in section 41, clause 2 are satisfied, the document ought to be registered without reference to the time limits mentioned in sections 23 and 26. The terms of section 27 which *expressly* state that a *will* may be presented for registration at any time, clearly preclude the contention that there is a right to present an authority to adopt also for registration at any time. The reasonable meaning of section 41, clause 2 is that, provided the other conditions mentioned in parts 4 and 6 are satisfied, an authority to adopt shall be registered if the registering officer is satisfied in respect of the three *additional* conditions mentioned in sub-clauses *a*, *b* and *c* of clause 2 of section 41.

I shall now come to the contention on the plaintiff's side about presentment. It was argued that as section 40 only allows the adopted son to present, nobody could present it for him even if he is a minor. In fact it was argued that even if the adopted son is an infant two years old, it was his hand that ought to present the document to the Sub-Registrar for registration. This would reduce to an absurdity the provisions of the Registration Act giving a right to present documents for registration to persons claiming under documents in the case of all documents executed in favour of minors or other persons under disability if the obligors or donors neglect or refuse to present them. Some English cases were quoted as regards the presentation to livings by minors but I must frankly admit that I was unable to follow the argument. I referred to Simpson on Infants (pages 73 and 74, 3rd Ed.) but I find that the guardian's concurrence is necessary when a minor presents to a living—no doubt, the mere act of making a mark and putting a seal by the hand of an infant *guided by the guardian* was held valid in an old case, the ground being that "there can be no inconvenience because the Bishop is to judge of the qualification of the clerk presented." I do not think that there is any analogy between presenting a document for registration and presentation to a living under the peculiar historical and

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religious circumstances connected with English Equity and Ecclesiastical law.

A guardian is a trustee (see section 20 of the Guardians and Wards Act) and he is entitled to exercise, *for the benefit of the minor*, all powers and do all acts which the minor could do if he were a major and such acts have the same legal validity as they would have if the minor did it after he attained majority. (See Trevelyan on Minors, pages 48, 49 and 139 as to guardianship being a trust and the guardian *representing* the minor fully). Presentation of documents for registration by guardians on behalf of minors has always been allowed by registration rules and officers as a matter of practice and it has been held to be valid in Appeal No. 200 of 1918 in this Court decided by Ayling and Napier, JJ; the donee of an authority to adopt (the widow of the donor) was a minor and her guardian's presentation for registration was held to be valid.

Under section 35 (1) (c) of the Registration Act, where an executant is dead, his representative can admit execution. But if the heir is a minor, his guardian should appear on his behalf according to rule 472 of the Registration Department Rules.

So also rule 493 says in regard to a question analogous to the one before us, "Under the general principle of law that a guardian may do all acts which are for the benefit of his ward, a will may be accepted for registration after the death of the testator from the guardian of a person claiming under it."

Another contention on the defendant's side was that section 87 of the Registration Act cures the defect of jurisdiction when a registering officer registers a document presented to him more than 4 months after its execution or after its arrival in British India provided that the registering officer *bona-fide* believed that it had been executed within 4 months or had been brought into British India within 4 months. Let us suppose a case in which the Sub-Registrar in good faith reads a document dated in January as dated in June and registers it in October. I do not think this is a mere irregularity which could be cured by section 87.

Next it was argued that under Hindu law the natural father of the boy after he had been adopted away, ceases to be

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his natural guardian. Admitting that this is so, it has been held in a Bombay Case (*Nirvanaya* v. *Nirvanaya* [1] that the natural father would continue to be the proper guardian of his son so far as it is necessary to take all steps to assert and establish his rights to be the heir of the adoptive father as against his rival claimants.

The next question is one of fact, namely, whether the defendant was actually adopted by Latchamma. I think the evidence is simply overwhelming on this point in defendant's favour. [His Lordship then goes into the evidence on the question.]

If the adoption is true and if the authority to adopt is genuine and if it is a valid authority to adopt as I have found, the plaintiffs have no case. As the 2nd defendant is the sole heir entitled to inherit the property as the daughter's son of Kothandaramiah. No. II, the dismissal of both suits by the District Judge has to be upheld.

In the result, the appeals fail and should be dismissed with costs of the principal defendant.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE MOORE.

Vittappa Kuda ...*Appellant*,* (*Plaintiff*).

v.

Durgamma alias Shithamma and others ... *Respondent*. (*Defendants* 1, 3 *and* 4).

Vittappa Kuda
v.
Durgamma.

Landlord and Tenant—Covenant against alienation—Breach—Forfeiture—Power of Courts to relieve against—English and Indian law.

A *mulgeni* lease contained a covenant against alienation by the lessee with a provision for re-entry by the lessor on breach of the covenant. The lessee alienated the property and thereupon the lessor sued for possession. *Held* that the court had no power to relieve against the forfeiture and that the lessor was entitled to possession on breach of the covenant.

The English law on the subject is applicable to this country as a rule of justice equity and good conscience.

Krishna Shetti v. Gilbert Pinto [2] Relied on.

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* S. A. No. 284 of 1919. 31st October, 1919.

[1] I. L. R. 9 Bom. 365.

[2] (1919) I L. R. 42 M. 654=36 M. L. J. 367.

Vittappa Kuda *v.* Durgamma.

Second Appeal against the decree of the Court of the Subordinate Judge of South Kanara in Appeal Suit Nos. 243 and 244 of 1917 (A. S. 248 and 273 of 1917 on the file of the District Court) preferred against the decree of the Court of the District Munsif of Karkal in Original Suit No. 147 of 1916.

B. Sitarama Rao and *K Srinivasa Rao* for Appellant.

K. Y. Adiga for the Respondent.

The Court delivered the following.

Judgment :—The suit was brought for a declaration that a gift deed executed by 1st defendant to 2nd defendant was not valid or binding on plaintiff and to recover possession of the property on the ground that 1st defendant had forfeited her rights under the mulgeni lease by alienating the property. The property originally belonged to the husband of the 1st defendant who sold it to the plaintiff. Plaintiff granted a Mulgeni lease to the 1st defendant in 1881 under Ex. A. A portion of the property was surrendered by the lessee in 1883 under Ex. B and the deed of surrender expressly stipulates for the rest of the property being enjoyed under the conditions in Exhibit A. The condition with which we are concerned relates to the prohibition of the alienation by the lessee of the property. The document recites that the property is granted to 1st defendant and to her vamshastas and provides as follows. " I and my descendants shall not alienate the said property, etc., on the strength of this mulgeni. If we alienate the same in contravention to the above provision the said alienation and also this mulgeni shall become null and void, and the said property etc., shall revert to your possession." In 1916 1st defendant made a gift of the property under Ex. 1 to one of her sons-2nd defendant. It is not disputed that by the grant of the mulgeni lease the property became the absolute property of the 1st defendant. Under the ordinary Hindu Law her daughters would be the heirs; it is found that 1st defendant has daughters and another son. Ex. 1 states that as the 1st defendant is unable to manage and as the alienee had agreed to maintain her, she made a gift of the property to one of her sons.

The question in these circumstances is whether this gift works a forfeiture of the rights of the 1st defendant. We are obliged to hold that it does. But for the decision in *Krishna*

Shetti v. *Gilbert Pinto,* [1] we would have imposed conditions and would have relieved against the forfeiture. That decision is a direct authority that where a condition restraining alienation has been infringed, there can be no relief against forfeiture. The Subordinate Judge has held that the gift under Exhibit 1 did not contravene the provision in Ex. A because it was made to a member of the family. Although Mr. Adiga endeavoured to support the construction placed on the document by the Subordinate Judge, we are clear that the conclusion of the lower appellate court cannot be sustained. The word Vamshastas in Ex. A means descendants, that is, persons who would take the property in the usual course of law. It does not refer to the members of the family. The expression indicates an absolute gift of the property like the words "Prof generation to generation". One other matter relating to the construction of the document may be disposed of before dealing with the principal matters and that is Mr. Adiga's suggestion that the property was given not only to the 1st defendant, the mother but also to her children. We are unable to agree with this contention. The word Vamshasthas only means descendants in the ordinary course of law. We must therefore hold that property was given absolutely to the 1st defendant ; there can be no doubt that she did alienate the property. The learned vakil for the respondents argued that it was not an alienation of the whole of the property and that consequently this case was covered by the decision in *Grove* v. *Portal* [2]. The property which was not surrendered by the lady was given to the son in its entirety. The fact that it formed part of the property originally given to her under Ex. A would not make the alienation one of a part of the property. The decision in *Grove* v. *Portal* [2] and the case which it follows *Church* v. *Brown* [3] have no application to this case. Now, the question is whether by the alienation to the son, forfeiture has been incurred. The rule of English Law seems to be very clear upon this point. In *McEacharan* v. *Colton* [4] where the property was leased to A who transferred it to B and B again re-transferred it to A, it was held that forfeiture was incurred. Lord

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[1] I.L.R. 42 Mad 654=36 M. L. J. 337.

[2] (1902) 1 Ch. 727.

[3] (1808) 15 Ves. (Jun.) 258 at page 265.

[4] (1902) Appeal cases 104.

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Macnaghten points out that by the breach of a covenant in the lease forfeiture was incurred and that the covenant in question applied to a re-assignment to the original lessees. In *Varley* v. *Coppard Common* [1] to which Mr. Sitarama Rao drew our attention, Mr. Justice Willes points out that where the grant was made to two persons and one of them transferred his right to the other, forfeiture was incurred. That is an extreme case. In *Corporation of Bristol* v. *Westcott* [2] Jessel M. R. expressed doubts as to the correctness of this decision. But in *Langton* v. *Henson*[3] the court of appeal reaffirmed the decision in *Varley* v. *Coppard Common* [1] and pointed out that the doubt thrown upon it in the dictum| in *Coporation of Bristol* v. *Westcott* [2] was not good law. There is no Indian case upon the question. The case nearest to the present is the decision of the Calcutta High Court in *Dharani Kanta Lahiri* v. *Siba Sundari Debi* [4]. In that case the property was given to a daughter to be held by her. She gave it to her adopted son and the question was whether by the alienation her right was lost and whether the grantor could resume the property. It was pointed out by the learned Judges that the right of resumption was expressly reserved by the grantor for the benefit of the grantee, and therefore forfeiture should be enforced. Having regard to the English decisions we have referred to, it seems to us that if the English Law is to be applied in this country, then the forfeiture clause must be enforced and the plaintiff should be given a decree. It was argued by Mr. Adiga that when the legislature of this country in Section 16 of the Civil Courts Act and in other provisions of law speaks of the rule of equity justice, and good conscience, it is not the letter of the English Law that should be imported but some deduction which the courts can make out of the rule of English law. We are unable to agree with the learned vakil upon this point. If there is no provision in the legislature of this country and if we are to apply the principles of justice, equity and good concience, we are not at liberty to whittle away the force of the rule of English law as proposed by eminent judges and substitute for it something which in our opinion should be

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[1] (1872) 7 Common pleas 505.

[2] (1879) 12 Ch. D. 461.

[3] (1905) 92 L. T. 805.

[4] (1908) I. L. R. 35 Cal. 1069.

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regarded as a rule of equity in this country. We think that if the rules of English law afford any ground for the application of the principles of equity, justice and good conscience, that should be applied *mutatis mutandis*, without presuming to deduce a new rule from it. In this view we are obliged to hold that by Ex. I 1st defendant has forfeited her right to the property and that the plaintiff is entitled to recover it from her and from her alienee.

Plaintiff will get a decree for possession and for rent and for mesne profits at the rate provided in Ex. A read with Ex. B. He is not entitled to any compensation. Compensation will be given to 3rd defendant at the rate agreed upon by the vakils in this court, Rs. 126. Each party will bear his own costs throughout.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE KRISHNAN.

Gandi Apparazu (*Petitioner* 1st accused.*)

Gandi
Apparazu
Inre.

Criminal Procedure Code S. 435 (4)—Case pending before Sub Magistrate—Police prosecution—Application by prosecution witness to the District Magistrate for committal and its rejection—Whether Sessions Judge can suo motu order committal after discharge by the Sub Magistrate—Complaint disclosing an offence—Dismissal by the Magistrate—No charge framed—Whether amounts to discharge.

The accused was charged under Ss. 147, 323 and 325 of the Indian Penal Code before a Sub Magistrate and while the case was pending before him a petition was made to the District Magistrate by the first prosecution witness to call for the records and direct a committal of the case to the Sessions. As the prosecution was by he Police the Dt- Magistrate sent the petition to the Police and finally rejected it on the ground that the Police were satisfied with the procedure of the Magistrate and also on the ground that the petition was incompetent. Then the accused was discharged by the Sub Magistrate on the complaint which alleged facts against the accused constituting an offence under S. 302 of the Indian Penal Code. The Sessions Judge acting suo motu under S. 436 of the Criminal Procedure Code set aside the order of discharge and directed the committal of the accused under S. 304 of the Penal Code.

Held, under such circumstances that the order of the District magistrate was no bar to the action taken *suo motu* by the Sessions Judge. S. 435 sub-section (4) does not apply to the case *Kalimuthu* v. *Emperor* [1] distinguished.

Where a complaint alleges facts constituting an offence under a particular section and the Magistrate disbelieves the evidence on the point and does not frame

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* Crl. R. C. No. 184 of 1919 11th September 1919.
Crl· C. P. C. No. 151 of 1919.

[1] (1902) I. L. R. 26 Mad. 477.

Gandi Apparazu *In re.*

any charge under that section the action of the Magistrate amounts in law to an order of discharge on those counts even though no express order of discharge is recorded by him *Krishna Reddi* v. *Subbamma* [1] followed

Petition under Ss. 435 and 439 of the Code of Criminal Procedure 1898, praying the High Court to revise the order of the Sessions Judge of Godavary at Rajahmundry dated 29th January 1919 in Crl. R. C. No. 1 of 1919 (C. C. No. 130 of 1918) on the file of the sub-Divisional Magistrate of Cocanada and R. C. No. 2 of 1918 on the file of the Sub-Magistrate of, Cosinga.

T. Richmond for the Petitioner.

V. L. Ethiraj for *the Public Prosecutor* on behalf of the Crown.

The Court made the following

Order :—It is contended on behalf of the petitioner the 1st accused that the learned Sessions Judge had no jurisdiction to order his committal to the Sessions on charges under Ss. 147 and 304 I. P. C. and that his order to that effect must be set aside.

As regards the charge under S. 147 I. P. C. we think the contention is well founded, as the accused was acquitted by the Sub-Magistrate on that charge under S. 258 Criminal Procedure Code. So long as that order of acquittal stands, he cannot be again charged and tried for that offence on the same facts. S. 403 Cr. P. Code is a bar to it. It was not open to the Sessions judge to set aside that acquittal or to treat it merely as an order of discharge as he seems to have done. His order so far as it refers to S. 147 I. P. C. must therefore be set aside.

But the charge under S. 304 I. P. C. stands on a different footing. Though the complaint alleged facts against this accused constituting an offence under S. 302 I. P. C. the sub-Magistrate disbelieved the evidence on the point and did not frame any charge under S. 302 or 304 I. P. C. His action amounted in law to an order of discharge on those counts, even though no express order of discharge was recorded by him. See *Krishna Reddi* v. *Subbamma* [1]. That being so, it was open to the Sessions

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[1] (1900) I. L. R. 24 Mad. 136.

Judge under S. 436 Criminal Procedure Code to act *suo motu* and set aside the implied discharge and direct the committal of the accused to the Sessions on being satisfied that he had been improperly discharged, as the offence under S. 304 I. P. C. is one exclusively triable by the Sessions Court.

But it is argued that the District Magistrate had passed a previous order on application by the complainant refusing to set aside that discharge and that that order prevents the Sessions Judge who is a co-ordinate authority with the Dt. Magistrate from re-opening the matter and reliance is placed on the ruling in *Kalimuthu* v. *Emperor* [1]. It was ruled in that case that under cl. (4) of S. 435 Cr. P. C., it was not competent to the Dt. Magistrate to entertain an application to commit when the Sessions Judge had already refused to pass such an order and that the reason of the prohibition applied equally to cases in which the authorities acted *suo motu*. It would not of course matter whether the District Magistrate or the Sessions Judge acted in the first instance as they are co-ordinate authorities under the section.

It seems to us however that this ruling is not applicable to the facts of the present case. What happened here was that as soon as the Sub-Magistrate framed charges under Ss. 147, 323 and 325 I. P. C. against the 1st accused and while the case was still pending before him, the first prosecution witness put in an application to the District Magistrate under S. 435, Cr. P. Code, asking him to call for the records and direct a committal of the case to the Sessions. The prosecution was a police prosecution though it was on the information of P. W. 1. The District Magistrate sent the petition to the Dt. Superintendent of Police recording on it that he was not inclined to stay proceedings or to call for the records: finally he rejected the petition on the ground that the police in whose hands the case was, were satisfied with the procedure of the Magistrate. Now it will be noticed that at the time the application was made there was no express order of discharge as to S. 304 I. P. C., nor could an order of discharge be implied under the authority of *Krishna Reddi* v. *Subbamma* [2] above referred to, as the trial had not come to a close, as in that case, a open to the Sub-Magistrate to frame further ch mit under S. 347 Cr. P. Code, if he thought fit t was thus no order of discharge to revise and th cannot be looked upon as one for that purpose. Magistrate also seems to have treated it as an application, as he declined jurisdiction under S. Code, and refused to call for the records on the gr the police were the proper parties to apply and not P. This case is therefore clearly distinguishable from the ca quoted. Neither the application nor the order of the District Magistrate who refused to entertain it and to consider it on the merits can thus be properly treated in our opinion as a bar to the action taken *Suo motu* by the Sessions Judge in this case. We may observe that if we considered that there was any difficulty in upholding the Sessions Judge's order we should have ourselves given notice to the accused and directed his committal to the Sessions under our revisional powers, if we considered it necessary in the ends of justice to do so, as the objection taken cannot apply in any case to our exercise of the powers vested in us. But as the objection to the Sessions Judge's order so far as it refers to S. 304 I. P. C. fails, it is not necessary to do so.

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[1] (1903) I. L. R. 26 Mad. 477.

[2] (1900) I. L. R. 24 Mad. 136.

On the merits there seems to be good reason for directing a trial of this accused in the Sessions Court. Both the Deputy Magistrate to whom the case of the other accused was sent up for enhanced punishment by the Sub-Magistrate and the Sessions Judge consider that the way in which the Sub-Magistrate dealt with the case was quite improper. There was a considerable body of evidence against this accused and the Sub-Magistrate should have properly committed him to the Sessions and not taken upon himself to discredit the case against him on the ground of *alibi* by giving him "the benefit of the doubt" as he did.

The order of committal by the Sessions Judge will therefore be confirmed subject to S. 147 I. P. C. being struck out of it.

C. A. S.

H COURT OF JUDICATURE AT MADRAS.

—MR. JUSTICE SPENCER AND MR. JUSTICE
AR.

an Rowther. ...*Appellant.* *(*Plaintiff*).

...*Respondent* (*1st Defendant*).

st—Permanent lessee from trustee—Right to eject trespasser.

nent lease of trust property in excess of the trustee's powers is not only voidable and it is competent to the lessee to sue for the ejectment of a passer from the demised land.

Venkataramana Ayyangar v. *Kasturiranga Iyengar* [1]. Distinguished. *Abhiram Goswami* v. *Shyama Charan Nandi* [2], *Palaniappa Chetty* v. *Sreemath Devasikhaman Pandarsannadhi* [3], Relied on.

Second Appeal against the decree of the District Court of Madura in A. S. No. 316 of 1917, preferred against the decree of the Court of the Principal District Munsif of Madura, in O. S. No. 656 of 1911.

W. Kothandaramayya for Appellant.

K. N. Aiya Aiyar and *A. Narayanaswami Aiyar* for Respondent.

The Court delivered the following

Spencer, J.

Judgments:—*Spencer, J.*—This is a suit brought by the assignee of a permanent lease granted by the trustee of a trust called Lala Dharmam to recover possession of the suit site from the tenant in occupation. The suit was dismissed in the District Munsiff's Court on the ground that the trustee had no power to alienate the trust property and that his alienation was void and conveyed no title to the plaintiff ; and on appeal the District Judge has confirmed this decision and dismissed the appeal.

It is contended before us that a grant of a permanent lease represented not a void but a voidable transaction and that it has not yet been avoided. In *Venkataramana Ayyangar* v. *Kasturiranga Ayyangar* [1] my learned brother stated : "It is now settled law that, ordinarily, a permanent alienation of trust properties is *ultra vires* of the powers of a trustee" and the respondent's pleader asks us to treat this expression "ultra vires" as meaning void ; but it does not necessarily have that signification. There is also an expression by Abdur Rahim, O. C. J., in the Full Bench opinion in the same case that the alienation of the right of making collections for the temple "was void and did not bind the temple in any way." When the learned Judge used the word "void" in this context he was not using it as opposed to voidable, as no argument was before him on the point of voidability.

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* S. A. No. 105 of 1919. 4th December, 1919.

1. (1916) I. L. R. 40 M. 212. 2. (1909) I. L. R. 36 C. 1003 P. C.

3. (1917) I. L. R. 40 709 P. C.

In *Palaniappa Chetty* v. *Sreemath Devasikamony Pandara Sannadhi* [1], the Judicial Committee of the Privy Council observed " the grant of a lease in perpetuity of debutter lands at a fixed rent required to be justified by unavoidable necessity." Such an expression would not have been used if the lease was itself a void transaction. Their Lordships compared the position of a *shebait* or trustee with that of a guardian of an infant as regards the management and control of immoveable property. It is well settled that if a guardian exceeds his powers in dealing with the property of an infant his acts are voidable and not void. In *Abhiram Goswami* v. *Shyama Charan Nandi* [2], the Privy Council were dealing with a Mokurari pattah which corresponds to a lease in perpetuity, and they held that such a lease of debutter property given by a Mohant was good for the life-time of the Mohant who granted it. It would have been impossible for them to come to this conclusion if the grant had been void *ab initio*. In *Kadir Ibrahim Rowthen* v. *Arunachellam Chettiar* [3] it was held that a lease by a trustee for a period exceeding 21 years was not void but only voidable at the instance of the *cestui que trust*. This was no doubt a decision based upon S. 36 of the Indian Trusts Act (Act II of 1882) which applies only to private trusts. But in this respect the principle appears to be the same, namely, that a lease of trust property which is in excess of the trustee's powers is not void but only voidable. I am therefore of opinion that the Lower Courts were wrong in deciding the case upon this point, and the appeal must be allowed and the suit remanded to the Court of first instance for trial upon the other issues in the case. Costs will abide and follow the result.

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1. (1916) I. L. R. 40 Mad. 709. 2. (1909) I. L. R. 36 Cal. 1003.
3. (1909) I. L. R. 33 Mad. 397=19 M. L. J. 737.

Kadhir Masthan Rowther v. Segammal.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.—I agree. The position of the defendant must be regarded as that of a trespasser. His title has not been gone into and therefore it must be taken that he resisted the suit on the ground that the plaintiff must show a better title than he possessed.

The position taken by the lower Courts and which was pressed upon us by the learned Vakil for the respondent, amounts to saying that the alienation by a trustee is void *ab initio* like an alienation which is opposed to public policy or one made illegally. This position to my mind is untenable. As my learned brother has just now pointed out, the Judicial Committee have held that a trustee has in certain circumstances power to dispose of the trust property; he can sell it and he can lease the property, provided a necessity for doing so has been made out. If that is the true position of a trustee, in granting a permanent lease, if no necessity is proved, he will only be exceeding the powers he possesses. Consequently the transaction, although it may be avoided by persons who could sue on behalf of the trust, would still give the alienee a right until it is avoided. This is the principle which the Judicial Committee must be taken to have enunciated in *Abhiram Goswami* v. *Shyama Charan Nandi,* [1] where they say that the alienation was good during the life-time of the grantor. Mr. Justice Beaman in *Mahamad Gaus* v. *Raja Baksha* [2] interprets the decision of the Privy Council in *Abhiram Goswami* v. *Shyama Charan Nandi* [1] as holding that an alienation by a trustee is not void altogether but only voidable. The Privy Council have further held that the power of a trustee of a temple is analogous to that of a manager of a Hindu joint family or the guardian of an infant. As regards the manager of a Hindu family it has never been held that an alienation by him is void *ab initio,* it is only voidable. Similarly in the case of an alienation by a guardian of an infant, S. 30 of the Guardian and Wards Act (Act VIII of 1890) declares in express terms that it is only voidable. It is also pointed out in *Kadir Ibrahim Rowthen* v. *Arunachelam Chettiar* [3] that the transaction of a private trustee granting a lease beyond 21 years

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[1] (1906) 36 Cal. 1003.

[2] (1912) I. L. R. 37 Bom. 224.

[3] (1909) I L. R. 33 Mad. 397=19 M. L. J. 737.

Kadhir Masthan Rowther v. Segammal.

Seshagiri Aiyar, J.

which the law permits him to grant is only voidable. Applying the analogy of these legislative provisions I agree with my learned brother that an alienation by a trustee cannot be held to be void.

The result is that if the defendant can show a better title than the plaintiff he will be allowed to retain the property ; if, on the other hand, he has no title he is not entitled to resist the suit brought by the plaintiff until the trustee or somebody interested in the trust takes steps to avoid the transaction. He has clearly a title which he can enforce as against a trespasser.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE KRISHNAN.

Ambalavana Pandara Sannadhi v. The Advocate General of Madras.

Ambalavana Pandara Sannadhi	...	*Petitioner* in both (4th respondent—5th respondent defendant respectively.*
v.		
The Advocate-General of Madras and others.	...	*Respondents in C. R. P. No.* 892 *of* 1919 *(Petitioner and 1st to 3rd respondents.*

Civil Procedure Code S. 92—*Or.* 1, R. 10—*Scheme suit —Addition of plaintiff —Power of court—Suit by worshippers with consent of Advocate-General—Addition of Advocate- General as plaintiff—Maintainability of suit by Advocate-General and worshippers obtaining his consent.*

In a suit for the protection of a trust under S. 92 C. P. C. the most important questions to be settled are those which relate to the administration of the trust and the court has power under Or. 1 R. 10 to add parties for the effectual adjudication of those questions.

The words "as between the parties to the suit" ought not to be read after the words "questions involved in the suit in" Or. 1 R. 10.

Under S. 92 a suit may be brought by the Advocate-General himself or by two worshippers to whom he has given his consent in writing to sue, or by the Advocate General in conjunction with those persons. The right of each to sue in his own name is no texclusive of the right of the other.

Parameswaran Munpee v. *Narayanan Nambudri* [1], Referred to.

Rama Aiyangar v. *Krishna Aiyangar* [2], followed.

Darves Haji Mahomed v. *Jainuddin* [3], Dissented from.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the orders of the Court of the Subordinate Judge of Kumbakonam dated 9-8-1919 in I. A. No. 486 of 1919 in O. S. No. 8 of 1918 and in I. A. No. 487 of 1919 in O. S. No. 71 of 1918 respectively.

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* C. R. P. No. 892 and 898 of 1919. 12th December, 1919.

[1] (1916) I. L. R. 40 M. 110.

[2] (1886) I. L. R. 10 M. 185.

[3] (1906) I. L. R. 30 B. 603.

T. Rangachariar T. V. Gopalaswami Mudaliar for Petitioner.

K. V. Krishnawsami Aiyar, A. C. Shanmuga Nainar for Respondents.

The Court delivered the following

Judgment :—The learned Subordinate Judge has directed the addition of the Advocate-General as a plaintiff to two suits under S. 92 of the Civil Procedure Code, which relate to the administration of a mutt and a temple, and the question we have to decide is whether we should in the exercise of our powers of revision interfere with that order.

It is argued that, if it be shown, as the defendant proposes to do that the other plaintiffs are not persons having an interest in the trust, the suit will be liable to be dismissed, and that the addition of the Advocate-General is not necessary for the complete disposal of the suit as originally instituted.

O. 1 rule 10 (2), Civil Procedure Code provides for the addition of parties whose presence is necessary in order to enable the court *effectually* and *completely* to adjudicate upon *all* the questions involved in the suit. We are not disposed to place a narrow construction on these words. The case in *Darves Haji Mahomad* v. *Jainudin* [1] certainly supports Mr. Rangachariar's arguments for the petitioner that a suit which is bad at its institution cannot be bettered by the addition of another plaintiff. But the view taken in Bombay has not been followed in this Court : see *Ramayyangar* v. *Krishna Ayyangar* [2] and Appeals Nos. 310 and 373 of 1918 and Appeal No. 9 of 1919 (un-reported).

We think that both the original plaintiffs and the Advocate General represented the public interests when they sued for the protection of a trust under section 92 of the Civil Procedure Code and in such a case the most important questions to be settled in the suit are those which relate to the administration of the trust and the court has power under O. 1 R. 10 to add parties for the effectual adjudication of those questions.

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1. (1906) I. L. R. 30 Bom. 603. 2. (1886) I. L. R. 10 Mad. 185.

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Madras.

(See *Parmeswaran Muntee* v. *Narayan Nambudri* [1]. We cannot read into the rule the words "as between the parties to the suit" after the words "questions involved in the suits" as to do so would be to defeat the object of this salutary provision of law for the final settlement of disputes, seeing that in almost every case a similar objection might be taken to the exercise of this power.

Another argument based on the wording of S. 92 of the Civil Procedure Code, is that a suit brought by the Advocate-General in conjunction with two other worshippers to whom he has given his consent in writing to sue, would be not maintainable. It is argued that the exercise of the right of action by one party exhausts the right of the other.

As we understand the section, the Advocate-General has the power to sue and the other parties have the same right and they may exercise that right separately or in conjunction with each other.

The right of each to sue in his own name is not exclusive of the right of the other. Cases in which there is a competition between two or more plaintiffs will be governed by O. 1 R. 1, C. P. C. subject to rules 2 and 11 of the same order. As the other plaintiffs have agreed in the lower court to the Advocate-General having the conduct of these suits, the defendant will not be embarrassed nor will the trial be delayed by the procedure which the lower court has adopted.

The Revision Petitions therefore fail and are dismissed with costs. (one set for each petition).

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE OLDFIELD AND MR. JUSTICE KRISHNAN.

Kandasami Goundan ... *Appellant* * *(Plaintiff).*

v.

Minor Kuppa Moopan and others... *Respondents* *(Defendants Nos.* (2, 3, 4, 5, 6 and 1.)

Hindu Law—Joint family—Mortgage by father—Suit thereon against him and his sons—Decree under Or. 34 R 6 C. P. C.—Plaintiffs' right to—Personal decree before sale of mortgaged property—Validity—Father's debt—Sons' liability during fathers' life-time—Sahu Ram's case—Effect.

Kandasami
Goundan
v.
Kuppa
Moopan,

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* S. A. No. 305 o f1919. 3rd December, 1919.

1. (1916) I. L. R. 40 Mad. p. 110=31 M. L. J. 279.

Kandasami Gounndan v. Kuppa Moopan.

In a suit against a Hindu and his sons upon a mortgage bond executed by the former, the court found the mortgage to be not binding as such upon the sons, passed a decree for sale in respect of the father's share of the mortgaged property and declined to pass a decree under Or 34 R. 6 C. P. C. though the plaintiff had expressly prayed for it. The claim for a decree under Or. 34 R. 6 was within time and the mortgage debt *qua* debt was not proved to be illegal or immoral. *Held*, in second appeal, that the plaintiff was entitled to a conditional decree for the recovery from the mortgagor personally and from the ancestral properties of himself and his sons of any balance left in case the net proceeds of the sale of the father's share of the mortgaged property was found to be insufficient to pay the amount due to him.

A conditional decree under Or. 34 R 6 can be passed in the mortgage suit itself without waiting for the mortgaged property to be sold to ascertain if any balance would be left over.

The observations in *Sahu Ram's case* [1] did not alter the law as to the pious obligation of a Hindu son, even during his father's life-time, for a debt of the latter, which is not immoral or illegal.

Second Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in Appeal Suit No. 70 of 1918 preferred against the decree of the Court of the Principal District Munsif of Coimbatore in Original Suit No. 47 of 1918.

T. M. Krishnaswami Aiyar, for Appellants.

K. R. Rangaswami Aiyangar, for Respondents.

The Court delivered the following

Judgment:—The Lower Courts have found that the suit mortgage was neither executed for an antecedent debt nor for any necessary purpose binding on the sons. It is therefore clear that the mortgage as a mortgage is not enforceable against the sons' shares in the property mortgaged and no mortgage decree for sale of those shares can be passed against them. This is not controverted by the appellant.

It is however claimed for the appellant that a conditional decree for the recovery of any balance left, in case the net proceeds of the sale of the father's share or the mortgaged property is found to be insufficient to pay the amount due to him,should have been passed under O. 34, rule 6, Civil Procedure Code, against the 1st defendant the mortgagor personally and against the ancestral properties of himself and his sons, as prayed for by him in his plaint.

That a conditional decree under S. 90 of the Transfer of Property Act can be passed in the mortgage suit itself without waiting for the mortgaged property to be sold to ascertain if any balance will be left over is clear from the observations of the Privy Council in *Mu ammat Jauna Bahu* v. *Raik Parmeshvar Narayan Mahthab Rai Bahadur.*[1] We think the same rule will apply under O. 34, rule 6. In the present case it is not denied that the present claim against the mortgagor under the mortgage-deed is within time and is legally enforceable against him. A conditional personal decree for any balance should therefore have been passed against him in this suit.

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[1] (1917) I. L. R. 39 All. 437 at 444.

Such a personal decree is in the nature of an ordinary money decree for a debt due by the father ; and for such a decree, unless the debt is shown to be of an illegal or immoral character, the ancestral property in the hands of the sons will be liable on the basis of their pious obligation to pay their father's just debts. It was recognised by the Privy Council itself in *Suraj Bunsi's case*[2] that in execution of a money decree against a Hindu father for a debt due by him joint ancestral property of himself and his sons can be sold and the purchaser will get a valid title to the son's shares as well, unless they show that the debt is of an illegal or immoral character. See page 171. It has also been decided in this Court that a creditor could join the sons in the suit on the father's debt and obtain a decree making their shares in the family property liable, see *Ramasami Nadan* v. *Ulaganatha Goundan*[3]. This view was further developed in a later Full Bench in *Mallesam Naidu* v. *Jugala Panda*[4] where it was held that the cause of action against the father and the sons on the debt was one and the same. After these decisions it has been the practice to give decrees in suits against Hindu fathers on money claims not only personally against them but also against the joint family property of themselves and their undivided sons where such sons are made parties and do not allege and prove the illegality or immorality of such claims. That a similar decree could be given in mortgage suits under S: 90 of the Transfer of Property Act corresponding to the present rule 6 was expressly decided in *Kishun Pershad Chowdhry* v. *Tippan Pershad Singh*[5], a similar-view was taken in *Addaika Pattar* v. *Natesa Pillai* [1] and an observation in support of it is also found in *Sami Ayyangar* v. *Ponnammal* [2].

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[1] (1918) 36 M. L. J. 215 p. 220.

[2] I. L. R. 5 Cal, 148.

[3] (1898) I. L. R. 22 Mad. 49 F. B.

[4] (1900) I. L. R. 23 Mad. 292.

[5] (1907) I. L. R. 34 Cal. 735.

It is argued however for the respondents that the recent decision of the Privy Council in *Sahu Ram's case* [3] has entirely altered the law on the point and the observations of their Lordships in page 444 have been relied on. This Court has considered the effect of this ruling in two cases recently in *Peda Venkanna* v. *Sreenivasa Deekshatulu*[4] and in the Full Bench *Armugham Chetty* v. *Muthu Kounden* [5]; and it was held that the pious obligation of the sons did arise during the father's lifetime and that the debt involved in a mortgage was an antecedent debt which attracted the pious obligation of the sons to pay even though the mortgage as a transfer of an interest in joint ancestral property failed. The mortgage as an alienation of the property may fail if there was no necessity for it and no debt really antecedent to the mortgage transaction; but the sons will nevertheless be under a pious obligation to pay the mortgage debt *qua* debt unless it is an illegal or immoral one. We are bound by these views and must hold that the observation in *Sahu Ram's case* does not alter the law on the point we are considering and we must follow the rule in the earlier cases. In fact such a point was not raised at all before the Privy Council; the point that their Lordships were considering was whether the mortgage was as such binding on the sons and whether a mortgage decree could be passed against them.

In the present case though the plaintiff prayed expressly for a decree under O. 34 Rule 6 against the ancestral property, the sons did not plead or prove that the debt was illegal or immoral. They cannot be given a fresh opportunity for the purpose. The plaintiff is therefore entitled to a decree as he asks for under rule 6 against the first defendant personally and against the ancestral property of himself and his sons.

The further point raised in this case is that the father's share liable for the mortgage decree is a one fourth share and not a

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[1] (1907) 17 M. L. J. 283. [2] (1897) I. L. R. 21 Mad. 28, page 29.
[3] (1917) I. L. R. 39 All. 437=33 M. L. J. 14.
[4] (1917) I. L. R. 41 Mad. 136=33 M. L. J. 519.
[5] (1919) I. L. R. 42 Mad. 711;

Kandasami Goundan v. Kuppa Moopan.

one fifth share as one of his sons now on record the fifth defendant was born after the mortgage was executed. This is not denied and therefore the decree of the lower Courts should be modified by also stating that a ⅕th share of the mortgaged property is saleable under the mortgage decree. With the above modifications the second appeal is dismissed but without costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER AND MR. JUSTICE BAKEWELL

Ottaparakkal Thazhath Soopi ... *Appellants**.

v.

Charichal Pallikkal Mariyamma and others ... *Respondents*

Ottaparakkal Thazhath Soopi v. Charichal Pallikkal Mariyamma.

Malabar Law—Tarwad—Kanom—Right of junior members to sue for redemption—Transfer of Property Act, S. 91 (a),

Except in very special circumstances where the karnavan is proved to be guilty of gross misconduct and collusion, it is not competent to the junior members of a tarwad to sue for redemption of a kanom granted by their karnavan.

Vasudevan v. *Sankaran* [1] Relied on.

Second Appeal against the decree of the Court of the Additional Temporary Subordinate Judge of the North Malabar in Appeal Suit No 23 of 1918, preferred against the decree of the Court of the Additional District Munsif of Tellicherry in Original Suit No. 218 of 1914.

C. V. Ananthakishna Aiyar for appellants.

K. P. M. Menon K. P. Kesava menon for respondents.

The Court delivered the following

Judgment :—This is a suit for redemption brought by junior members of what is termed a *strisothu* Tarwad, the manager of which is a woman called a Karnavathi and the members of which are governed by Marumakkathayam Law. The suit has been decreed, and the first question before us is whether the plaintiffs had a right to maintain it. As laid down in *Vasudevan* v. *Sankaran* [1] and numerous other decisions, a Karnavan is at once the manager and the mouthpiece of the tarwad, or in the words of Mr. Justice Holloway "a Malabar family speaks through its head the Karnavan and in Courts of Justice except in antagonism to that head can speak in no other way."

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* Second Appeal No. 71 of 1919. 5th November, 1919.

1. (1897) I. L. R. 20 M. 129.

So although we might be prepared to hold that junior members of such a family were, generally speaking, persons having an interest in tarwad property within the meaning of S. 91, Transfer of Property Act, where the individual right of suit from the point of view of the personal law of the parties is in question, we are fully in agreement with the statement of law laid down in S. A. No. 959 of 1917 where it was declared by Phillips and Kumaraswami Sastri, JJ. that only under very special circumstances could the anandravans of a tarwad maintain a suit for redemption of a kanom granted by their karnavan, as such a suit would amount to an act of interference in the karnavan's management of tarwad affairs.

In the present case the plaintiffs alleged in their plaint that the 1st defendant was acting in collusion with the 16th defendant, the Kanomdar, and was ready to do any act prejudicial to the tarwad, and again, that if the possession of the properties was not recovered at once the jenmam title of the tarwad would in course of time be prejudiced. In her written statement the 1st defendant denied all the imputations made against her in the plaint.

The onus then clearly lay on the plaintiffs to establish under the first issue that such very special circumstances existed as would justify a suit being brought by them without the concurrence of the Karnavathi. They adduced no oral evidence at all and there is nothing on the record to show that the 1st defendant had so misbehaved as to make it imperative to take the conduct of the affairs of the tarwad in such matter as the institution of suits etc. out of her hands. The District Munsif assumed that the 1st defendant was colluding with the 16th defendant, but apparently his only ground for drawing this inference was that she asked to have the suit dismissed. There may be many reasons why the continuance of the kanom might be beneficial to the tarwad. The terms as to the payment of purapad may be favourable. The tarwad may not have enough money readily available for defraying the large amount due for improvements. The courts below have not gone into these matters and decided that any "very special circumstances" existed for redeeming the kanom as soon as it became redeemable. In the absence of such proof the plaintiffs cannot maintain the suit. It is unnecessary to deal with the other grounds. The appeal is allowed and the suit is dismissed without prejudice to the tarward's right of redemption in a properly instituted suit. The appellant will get his costs throughout from the respondents 1 to 4. The other respondents will bear their own costs throughout.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE PHILLIPS.

W. H. Lockley ... *Appellant.* * *(Prisoner).*

Criminal Procedure Code. S. 235—Misjoinder of charges—Receiving stolen property and cheating—charges of—Joinder-Validity—ss. 256, 257—scope and applicability—Accused entering upon his defence—what amounts to—Prosecution witness allowed to depart on representation that accused would not require him further—Application to re-cross-examine one under S. 256 or 257—Evidence Act S, 33—Evidence in judicial proceeding—Admissibility in later proceeding-cross-examination in part—Right to futher cross-examine—Effect.

The accused was employed in Messrs. Oakes & Co., as Works Manager. The case against him was that he purchased certain machinery for the company for Rs. 2,000, but represented to the Managing Director, Mr. Wilson, that the amount was Rs. 3,000. and consequently obtained a cheque from him for the latter amount. The original charge against the accused was that he received stolen property from the vendor. After the prosecution evidence was closed, an alternative charge under S. 420 I.P.C. was added. Mr. Wilson was one of the prosecution witnesses, and, after his examination and cross-examination were concluded, the accused's counsel stated that he would not be required for re-cross-examination even in case a charge was to be framed.

After the charge was framed, the accused pleaded not guilty and gave to the court a list of witnesses he desired to examine in his behalf. Immediately he also applied for re-summoning Mr. Wilson. After several adjournments granted for the purpose of enabling the accused to secure the attendance of Mr. Wilson, the Magistrate disposed of the case without having any further examination of Mr. Wilson, convicted the accused of the offence of cheating. On appeal against the conviction,

Held (1) as regards the plea of misjoinder of the charges of receiving stolen property and of cheating, that the case was governed by S. 235 Cr. P. C.;

(2) that the right referred to in S. 256 Cr. P. C. applied only to cases of witnesses actually before the court when the charge is read out.

(3) that the accused had entered upon his defence before applying to recall Mr. Wilson and his application for the purpose must be deemed to have been made under S. 257 Cr. P. C. which gives the Magistrate discretion in the matter.

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*Criminal Appeal No. 554 of 1919. 3rd December 1919.

Lockley
v.
Emperor.

Per Seshagiri Aiyar, J :—A waiver by Counsel cannot prejudice the right of the accused under Ss. 256 and 257 Cr. P. C.

Once the opportunity to cross-examine is exercised, the evidence of a witness in a judicial proceeding becomes complete for the purpose of being admitted in a later proceeding and the mere fact that the witness could have been subjected to a further cross-examination in the exercise of a further right does not render such evidence inadmissible.

Per Phillips: If a witness is allowed to depart on the representation of the accused that he will not be further required, any further application to re-cross-examine him must be deemed to be one under S. 257 Cr. P. C.

Appeal against the judgment of the Court of the Second Presidency Magistrate, George Town, Madras, in Calendar Case No. 7080 of 1919.

T, Richmond for the Appellant.

The Crown Prosecutor (*C. Sydney Smith*) for the Crown.

The Court delivered the following

Seshagiri Aiyar, *J.*

Judgments :—*Seshagiri Aiyar J.*—The accused has been convicted of the offence of cheating. He was employed in Messrs. Oakes & Co., as Works Manager. Mr. Wilson was employed in the same firm in a slightly higher capacity. The case for the prosecution is that the accused received Rs. 3,000 from Mr. Wilson on the representation that the money was required for paying for certain articles purchased for the firm from the Chief Engineer of S. S. Ural, but that he only paid Rs. 2,000 to the Chief Engineer and misappropriated the balance.

The arguments in appeal were mainly devoted to attacking the procedure followed by the Magistrate. Mr. Richmond's first complaint was that there was a misjoinder of charges. The facts on which this contention was based are these :—

The original charge against the accused was that he received stolen property from the Chief Engineer. After the prosecution evidence was closed, an alternative charge under Section 420 Indian Penal Code was added. The learned counsel contended that a charge for receiving stolen property should not have been joined with a charge for cheating. I fail to see the force of this objection. The request to Mr. Wilson for the payment of Rs. 3,000 was in furtherance of the purpose of concluding the purchase from the Chief Engineer. It was said that as the articles were handed over to the accused, the negotiations for the purchase had terminated and that the subsequent receipt of money which was misappropriated had therefore no connection with the receipt of the article.

Section 235 speaks of a series of acts forming part of the same transaction. There can be little doubt that in arranging with the chief Engineer for the purchase the accused intended that that purchase should be effectuated by inducing Mr. Wilson to give him money for it. The true test of a series of acts forming the same transaction is, that there should be a continuous operation of acts leading to the same end, and a common purpose should run through all the acts. See *Emperor* v. *Sherufalli* [1]. For misappropriating Rs. 1,000, the first act was to arrange for the bargain and the second act was to obtain the money. Both these are connected together and have the same community of purpose. I must therefore reject the contention that there has been a misjoinder of charges.

The next contention related to the refusal of the presidency Magistrate to adjourn the case to enable the accused to further examine Mr. Wilson. The facts relating to this part of the case are these: Mr. Wilson was examined for the prosecution and was cross-examined at some length by the counsel for the defence. The witness had made arrangements for leaving India. Thereupon the Magistrate asked counsel for the defence whether he would insist upon the presence of Mr. Wilson any further. We find this note made by him. "Mr. Grant has given up the re-cross-examination of Mr. Wilson, even in case a charge is to be framed." After this statement by counsel Mr. Wilson left India.

It is argued that this waiver by counsel does not disentitle the accused from claiming that on the framing of a charge, the witness should be recalled. It was first contended that the waiver, if any, was only with reference to the charges originally framed and not to the alternatve charge added. The counsel who conducted the case before the Presidency Magistrate must have known that evidence as to cheating was being tendered by the prosecution. Mr. Wilson himself gave that evidence and he was subjected to cross-examination upon that matter. Therefore this suggestion cannot be accepted. I however agree that a waiver like this cannot prejudice the right of the accused under sections 256 and 257 of the Code of Criminal Procedure. Vide *Kokil Ghose* v. *Kasimuddi Malita* 1.

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[1] (1902) I. L. R. 27 B. 185.

I shall now see whether in the circumstances of this case, the right claimed is an absolute one. There have been some conflict of views upon the interpretation of Ss. 256 and 257 of the Code of Criminal Procedure. Therefore I shall first of all deal with the language of the Sections before dealing with the decided cases.

The procedure prescribed for trial is this : Where an accused is not discharged, a charge is to be framed. Section 255 lays down that the charge shall be read to the accused and that he shall be asked whether he is guilty or has any defence to make. Section 256 says that, if the accused claims to be tried, he shall be required to state whether he wishes to cross-examine any, and if so, which of the witnesses for the prosecution whose evidence has been taken'. "If he says he does so wish, the witnesses named by him shall be *recalled* and after cross-examination and re-examination, if any, they shall be *discharged*". This language seems to indicate that the witnesses are still in Court, because when we come to Section 257, there we find mention of processes being issued for compelling the attendance of witnesses to be further examined ; there is no such mention in S. 256. And the further provision that the witnesses shall be *discharged* has reference to the ordinary practice in criminal courts, of witnesses being bound over to attend court *de die in diem* ; it is on the framing of the charge and after ascertaining the wishes of the accused, they are ordinarily discharged. There is no injustice done to the accused by such a procedure, because a further right is given him of summoning the witnesses for the prosecution who might have been discharged. Therefore in my opinion, the right referred to in Section 256 which is absolute and unqualified is intended to apply only where the witnesses are still before the Court and before they

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1 (1902) 6 C. W. N. 424.

have been discharged from further attendance. In my opinion, in the present case, the application to further examine Mr. Wilson, is not covered by Section 256, but comes under Section 257. The Calcutta High Court in *Iswar Chunder Raut* v. *Kali Kumar Dass* [1] appears to have taken the view that even in cases the witnesses are not before the Court, the accused has the absolute privilege of demanding that they should be summoned. *Zamunia* v. *Ram Tahal* [2] takes the same view. Vide also *Inder Rai* v. *Brown*, [3] The view taken in Allahabad is different. See *Mula* v. *Sheo Raj Singh* [4]. In this conflict of authorities I am free to express my opinion upon an examination of the language of the sections, and my conclusion is that in the present instance the privilege claimed by the accused is not an absolute one. I am clear that this will not prejudice the accused. If his legal advisers keep their eyes open, he is not likely to suffer by holding that section 256 only applies to cases of witnesses actually before the Court when the charge is read out. An accused has the right to cross-examine the witnesses before the charge is framed ; he has a right of re-cross-examining the witnesses present in Court after the charge is framed ; he has a further right subject to certain conditions of re-summoning the prosecution witnesses after entering upon his defence. These are ample safeguards, and I do not think that to confine Section 256 to the category of cases mentioned by me is likely to affect the accused in his defence.

The next question relates to the construction of section 257. In the first portion of that section, it is stated " if the accused, after he has entered upon his defence applies to the Magistrate to issue any process for compelling the attendance of any witness for purposes of examination etc., the Magistrate shall issue such process unless he considers that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice. Such ground shall be recorded by him in writing". Some arguments were addressed to us as to whether the stage of entering upon the defence was reached when the Magistrate refused to adjourn the case for further examination of Mr. Wilson. From the record it is clear that after the charge was framed, a list of witnesses was given by the accused and the case was adjourned for the examination of the defence witnesses. No doubt the proper procedure to have adopted was to have asked the accused whether he insisted upon the cross-examination of any of the witnesses for the prosecution who may have been present in Court ; but it does not appear that any such witnesses were present or that any such right was claimed. Therefore I must hold that the accused entered upon his defence by pleading not guilty and by mentioning that he has witnesses to examine. It is true that the application for re-summoning Mr. Wilson was made at once, but that would not show that the stage of entering upon the defence had not been reached when the accused, through his counsel informed the Magistrate that he has witnesses to examine.

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[1] (1900) 4 C. W. N. 851.
[2] (1900) I. L. R. 27 Cal. 370=4 C. W. N. 469.
[3] (1909) I. L. R. 37 Cal. 236.
[4] (1911) 11 Ind. Cas. 1007=8 A. L. J. 707.

I have now to see whether the Magistrate has recorded his reasons in writing for refusing to re-summon Mr. Wilson. He has mentioned them in his judgment; the matter itself came before the High Court on an application made to postpone the hearing pending the arrival of Mr. Wilson. The Magistrate should no doubt have put on paper his reasons for the refusal. However that is an irregularity which does not vitiate the case, having regard specially to the fact that he has given full reasons in his judgment, and the matter has been fully gone into in this Court on a previous occasion.

Another question is whether the refusal to adjourn was justifiable. If I understood Mr. Richmond aright, the facts which were expected to be elicited from the further examination of Mr. Wilson were intended to show that that witness himself was a party to the misappropriation. Mr. Richmond said that it could be elicited from the witness that it is the custom among merchants, at least among the employees of Oakes & Co., to take money from the firm, with a view to profiting personally from the bargain that may be concluded in the name of the firm. The disingenuousness of such a plea is apparent on the face of it. Moreover when Mr. Wilson was in the witness box no such question was put to him and no witnesses were summoned from Oakes & Co., or from any other firm to prove such a pernicious practice. It seems to me therefore that the object in asking for the adjournment was not really to advance justice but to delay it. I am therefore of opinion that the refusal to adjourn the case was justifiable under section 257 of the Code of Criminal Procedure.

The last question to be considered is whether the evidence already given by Mr. Wilson is inadmissible because a further opportunity was not given to cross-examine him. I agree with the contention of the learned Crown Prosecutor that the evidence is admissible. Under Section 33 of the Evidence Act evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a later stage of the same proceeding the truth of the fact which it states, when the presence of the witness cannot be obtained without an amount of dealy or expense which the Court considers unreasonable, provided the adverse party in the first proceeding had a right and opportunity to cross-examine. The evidence of Mr. Wilson was given at the earlier stage of the present proceedings. From the statement of the learned Crown prosecutor as well as of Mr. Richmond, it is not known when and whether Mr. Wilson will come to India. It is also clear that the accused had the opportunity to cross-examine and exercised that right at the first stage. Mr. Richmond suggested that as the accused had a further right under section 257, that until that right was exercised, the evidence could not be admitted. Whatever may be the value to be attached to the evidence, I agree with the contention of the learned Crown Prosecutor that once the opportunity to cross-examine had been exercised, the evidence then taken becomes complete for the purpose of being admitted in a later proceeding. The mere fact that the witness could have been subjected to a further cross-examination in the exercise of the further right is not a ground for holding the evidence to be inadmissible. I am therefore of opinion that Mr. Wilson's evidence given before the charge was framed is admissible in the case.

On the merits, Mr. Richmond argued that no criminal intention was proved as the accused admitted the receipt of money and pleaded that he applied a portion of it for his own use in what he considered to be the usual practice in such matters. I am wholly unable to accept this argument as sound. The Magistrate is right in holding that a clear case of misappropriation has been made out. I confirm the conviction and sentence.

Phillips, J.

Phillips, J:—As this case raises a question of some importance which has not been decided before in this Court, I think it advisable to deliver a separate though concurring judgment. The accused has been convicted under S. 420 Indian Penal Code by the George Town Presidency Magistrate. The case is that he purchased certain machinery for Messrs. Oakes & Co., for Rs. 2,000, but represented to the Managing Director, Mr. Wilson, that the amount was Rs. 3,000 and consequently obtained a cheque from Mr. Wilson for the latter amount. No doubt, the accused was not originally charged under S. 420. The charge sheet was laid under S. 411 or 414 Indian Penal Code, but it is clear from the examination and cross-examination of Mr. Wilson and other witnesses that the possibility of the charge under S. 420 was before the mind not only of the Court but also of the accused, and it cannot be said that the accused was in any way taken by surprise by such a charge being framed on the facts laid before the court. After Mr. Wilson's examination was concluded, the accused's counsel stated that Mr. Wilson would not be required for re-cross examination, and apparently on the strength of that, Mr. Wilson was allowed to proceed to England whence he has not yet returned and it is unknown when he will return. Very soon after the charge was framed, an application was made for re-cross-examining Mr. Wilson and the case was adjourned with a view to secure his attendance. After several adjournments, the Magistrate refused to adjourn the case any further, as the attendance of the witness could not be secured, and apparently acting under S. 257 Criminal Procedure Code he proceeded to dispose of the case without having any further examination of Mr. Wilson. He has recorded his reasons for doing so in his judgment and the question we have to decide is whether he was right in acting under S. 257, or whether the accused had not an absolute right under S. 256 to recall Mr. Wilson before the case was closed.

Under S. 256, the accused is given the right of re-calling any of the prosecution witnesses as soon as the charge is framed, and after such re-examination, the accused is to be called upon to enter on his defence. It has been held in Allahabad by Knox, J., in *Mulua* v. *Sheo Raj Singh*[1] that this absolute right of the accused extends only to the recalling of such witnesses as are present in Court. No doubt, it is ordinarily the duty of the Magistrate to retain the prosecution witnesses in Court until the accused has had an opportunity of exercising his right. The Calcutta view is somewhat different. In *Iswarchander* v. *Kali Kumar Dass* [2], the accused was held to be entitled as a matter of right to re-summon one of the prosecution witnesses. The question as to whether there is any difference between the provisions of Ss. 256 and 257 or what that difference is, was not discussed. The other two Calcutta cases cited, namely, *Zamunia* v. *Ram Tahal,* [3] and *Inder Rai* v. *Brown* [4], take the same view, but in the former case it is further laid down that when an accused has entered upon his defence his right to re-cross-examine witnesses is governed by S. 257 Criminal Procedure Code. I however think it significant that the word "recall" alone is used in S. 256 and that it means a mere calling in of the witnesses who may be present in or about the Court precints, for if it also includes the re-summoning of witnesses, the procedure in all cases would be most cumbersome. First of all, a charge will have to be framed, then the prosecution witnesses will have to be re-summoned and further cross-examined and then the accused will have to be called upon to enter on his defence and yet another adjournment will be necessary for the defence witnesses. This appears to me to be an undue prolongation of the trial, and as another interpretation of the section is possible and has been adopted in the Allahabad High Court, I think that that interpretation is correct. If the Court has allowed the witnesses to depart without re-cross-examination, then no doubt the Magistrate would not

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[1] (1911) 11 I. C. 1007.
[2] (1900) 4 C. W. N. 351.
[3] (1900) I. L. R. 27 Cal. 370.
[4] (1909) I. L. R. 37 Cal. 236.

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refuse to re-summon under S. 257 unless there were some special circumstances to justify the refusal. But if as in this case, a witness has been allowed to depart on the representation of the accused that he was not required, I think that any further application to re-cross-examine him must be deemed to be one under S. 257. Under that section, the Magistrate is empowered to refuse the application for grounds given in the section,—one of which is that it would defeat the ends of justice. The Magistrate in this case framed a charge and admittedly the prosecution witnesses were not then present and the accused had therefore no opportunity of re-calling them. He was therefore called upon to enter on his defence and stated that he had witnesses to examine and promised to put in a written statement of his case. That being so he had entered upon his defence and I think the Magistrate was justified in asking him to do so. The subsequent application to recall Mr. Wilson must therefore be deemed to have been under S. 257, which gives the magistrate discretion in the matter. I cannot therefore hold that he has acted with any illegality in refusing to adjourn the case for the re-examination of Mr. Wilson.

The second question then arises as to whether the Magistrate properly exercised his discretion. It is suggested for the defence that Mr. Wilson, when he gave a cheque for Rs. 3,000, was perfectly aware of the fact that accused was only going to pay Rs. 2,000 for the goods purchased and acquiesced in his retaining the additional Rs. 1,000, as a sort of *'secret commission'*, as it is called. What the so-called secret commission really amounts to is a sum obtained from the company, who employed the accused and Mr. Wilson, by fraud. The company was made to pay more than the proper price for the goods, the balance going into the pocket of the accused. If, therefore, Mr. Wilson were to admit that he was aware of this secret commission, he would be declaring himself a party to this fraud; and apart from the unlikelihood of his making any such admission, it is very strange that no such question was put to him in his cross-examination which was fairly detailed and made at a time when the accused must have known that this was one of his defences. In view

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of the fact that this defence was put forward afterwards, it is impossible to say that the ends of justice require the attendance of Mr. Wilson for further examination. The fraud was not that the accused obtained this money from Mr. Wilson personally, but as Directing Manager of Messrs. Oakes & Cos'. Engineering works. I therefore think that the Presidency Magistrate exercised his discretion properly, and I reject this ground of appeal. As regards the plea of misjoinder, it seems to me that the case is clearly governed by S. 235 Criminal Procedure Code. On the evidence on record, the charge under S. 420 is clearly made out, and therefore the accused's appeal must be dismissed and his conviction and sentence confirmed.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AMD MR. JUSTICE SPENCER.

Sundaresan ... *Petitioner** (*Accused.*)

In re.

Sundaresan
In re.

Criminal Procedure Code, S. 190 (1) (c)—District Magistrate—Cognizance of offence on information received by him in another capacity—Legality of.

S. 190 (1) (c) of the Code of Criminal Procedure empowers a District Magistrate to take cognizance of an offence upon information received by him in another capacity *viz.*, as president of the District Board.

Thakur Pershad Singh v. *The Emperor* [1] not followed.

Lakhi Narain Ghose v. *Emperor* [2] referred to.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, and S. 107 of the Government of India Act 1915 praying the High Court to revise the order of the District Magistrate of Coimbatore dated the 16th day of July 1919, and to direct the stay of further proceedings in R. C. No. 5 of 1919 on the file of the Court of the Taluk Magistrate of Avanashi pending disposal of the Revision Petition.

S. Subramania Aiyar, for the Petitioner.

The Public Prosecutor, for the Crown.

The Court made the following

Abdur
Rahim, J.

Order :—*Abdur Rahim, J.*—The District Magistrate of Coimbatore who is also the President of the District Board, had been informed that a certain cheque had been forged and he has taken cognizance of the offence against the accused under S. 190 (1) (c) of the Code of Criminal Procedure. It is argued that he had no such power. But I must admit, it is difficult to find any basis for such an argument in face of the language of S. 190 (1) (c) which is to the effect that the District Magistrate may take cognizance of any "offence upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed." There can be no doubt upon the order recorded by the Magistrate, that he suspected that the accused had committed an offence of forgery and he has set out the facts which led him to that suspicion. Reliance has been placed in support of the petition upon several decisions of the Calcutta High Court, one of which is reported in *Thakur Pershad Singh* v. *The Emperor* [1]. There it is laid down, following two older decisions of the same Court (*In the matter of Surendranath Roy* [2] and *In the Matter of Mohesh Chunder Bannerjea* [3]) that a Magistrate taking cognizance of an offence is bound to disclose the information, private or otherwise, upon which he issues a warrant for the arrest of the accused. So far as that goes, the information is set out in the order of the Magistrate in this case. But it is further observed: "There is nothing on the record to show that the information, whatever it may have been, which he received was not lodged to him as Collector; and if that were so, it was not open to him as Magistrate to act on that information and proceed to issue warrants against the petitioners. Practically by such action he is making himself a Judge in his own case, for the case seems to be that he with the other co-proprietors granted a lease on certain terms to Chamroo Sahoo and that Chamroo has tampered with that lease."

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* Crl. R. C No 540 of 1919. 19th December, 1919.
Crl. R. P. No. 459 of 1919.

[1] (1906) 10 C. W. N. 775.

[2] (1910) I. L. R. 37 C. 221.

It is urged that here the information which Mr. Macqueen had, was derived from his position as the President of the District Board and that therefore he could not use that information in order to act under S. 190 (1) (c). With all respect to the learned Judges who decided the case in *Thakur Prasad Singh* v. *Emperor* [1] it is difficult to see wherefrom they obtained the limitation which they imposed upon S. 190 (1) (c) and I find

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[1] (1906) 10 C. W. N. 775.
[2] (1870) 5 Beng. L. R. 274.
[3] (1870) 13 W. R. (Cr. R) 1.

Abdur Rahim, J.

that in a later ruling of the same Court *Lakhi Narayan Ghose* v. *Emperor* [1] one of the learned Judges, Mr. Justice Carnduff doubted the correctness of that ruling. It seems to me that when a District Magistrate is given such a wide power as to take cognizance of an offence on suspicion, it would be disregarding the express language of the legislature to lay down that he cannot act if his suspicion or knowledge is based on facts which came within his cognizance in another capacity. It may be that in some cases the exercise of such a power by Magistrates may cause considerable hardship and such a power may be liable to be harshly exercised. But we have nothing to do with that. Where certain powers are conferred on Magistrates by the legislature it is no business of the Court to lay down limitations which are unwarranted by the language of the Code.

The petition therefore must be rejected, but the accused will remain on the same bail pending trial.

Spencer, J.

Spencer, J.—I concur. I only wish to add that I agree with the opinion of Mr. Justice Carnduff in *Lakhi Narayan Ghose* v. *Emperor* [1], that the decision in *Thakur Prashad Singh* v. *The Emperor* [2] goes beyond the provisions of the Code and is not a decision which can be followed without question.

Another case in *Jhuna Lal Sahu* v. *The King Emperor* [3] was quoted to us. But, as I understand that case, there was a complaint in writing of which, the Magistrate might have taken cognizance under S. 190 (1) (a) and the learned Judges were of opinion that, having such a complaint before him, the Magistrate was not justified in taking cognizance of the same under S. 190 sub-section 1 (c) as if it was a matter that had come to his knowledge from a source other than a complaint of facts constituting an offence, as "complaint" is defined in the Code.

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[1] (1910) I. L. R. 37 Cal 221.
[2] (1906) 10 C. W. N. 775.
[3] (1917) 2 Pat. L. J. 657

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE BURN.

Arunachala Chettiar and others ... *Appellant.* (*Plaintiff*).*

v.

Municipal Council of Mayavaram ... *Respondent* (*All Second Appeals Nos.* 1859 *to* 1876 *of* 1918) (*Defendant in all the cases*).

Arunachala Chettiar v. Municipal Council of Mayavaram.

Madras District Municipalities Act (*IV of* 1884) *S.* 24—*Drains attached to public street—Vesting of in municipality—Adverse possession of drain—Proof of.*

Drains attached to a public street and intended to carry off water falling on the street, vest in the municipality under S. 24 of Madras Act IV of 1884, even though the site of the drains might belong to private individuals.

Basawaswaraswami v. *The Bellary Municipal Council* [1], *The Chairman Municipal Council, Srirangam* v. *Subba Pandithar* [2] Relied on.

To constitute adverse possession of a street drain as against a municipality, it must be shown that the enjoyment of the drain as a drain by the municipality was prevented openly and as of right.

Second Appeal against the decree of the District Court of Tanjore in Appeal Suits Nos. 256 to 263, 265 to 271, 273, 274 and 279 of 1917 preferred against the decrees of the Court of the District Munsif of Mayavaram in Original Suits Nos. 80 to 86, 88, 90 to 94, 96, 98, 100, 101 and 195 of 1915.

T. V. Muthukrishna Iyer and *N. Muthuswami Aiyar*, for Appellants.

T. R. Venkatarama Sastri, for Respondent.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments :—*Sadasiva Aiyar, J*:—In S. A. Nos. 1859 to 1875 of 1918. The plaintiffs are the appellants in these 17 second appeals, the common defendant being the Municipal Council of Mayavaram. The plaintiffs are the owners of the shops alongside the Thirumanjana street which is vested in the Mayavaram Muncipality. There are drains on both sides of the street, into which the rain water falling on the street flows and hence the drains are attached to the street in a real sense. Assuming that the sites of the drains belong to the owners of the shops, the question is whether these drains vest in the Municipality under S. 24 of the District Municipalities Act. It is unnecessary for the purpose of these cases to consider whether, if a drain is wholly unconnected with the street such as being carried on a low sidewall above the level of the street (though the wall is just alongside the roadway) and being used by the owner of the wall for carrying off water along his own wall sites, such a drain also will vest in the Municipality as part of the street (see the definition in the Madras City Municipal Act S. 3 (27) (c), where it is made clear that the drain should be attached to the street in order to vest in the Municipality). In the present cases the drains were clearly useful and intended for carrying off water falling in the street itself. The question we have to decide seems to be concluded by the decisions of this Court of which it is only necessary to refer to *Mothe Achayya Garu* v. *Municipal Council of Ellore* [1] *Basawaswaraswami* v. *The Bellary Municipal Council* [2]. *The Chairmam Municipal Council, Srirangam* v. *Subba Pandithar* [3] and *Corporation of Madras* v. *Mohan Lal, Sowcar* [4].The Mayavaram Municipality was established in 1866. The Thirumanjanam Street itself is admitted to be a public street. The drains became therefore vested in the Municipality under S. 24, at least in 1884, under the Act of 1884. The plaintiffs can acquire adverse title against the Municipality only if they did any acts by which the Municipality were prevented from enjoying the drains as drains. The Municipality's possession and enjoyment consisted principally in the water of the street falling into and being carried off by the drains. Unless that was prevented openly as of right, there can be no adverse possession against the Municipality. The learned District Munsif himself says in paragraph 15 of his judgment that "title by adverse possession can be acquired against the Municipality even in respect of a portion of a street, if the mode of occupation by the person in possession has been such as to exclude any enjoyment of it by the Municipality as a street." Substituting the word 'drain' for 'street', unless the enjoyment of the drain by the Municipality as a drain is prevented there could be no adverse possession. The mere fact that the Municipality did not repair the drains or that the plaintiffs have been repairing or looking

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* S. A. Nos. 1859 to 1876 of 1918. 9th October 1919.

[1] (1912) I.L.R. 38 M. 6=23 M.L.J. 479 [2] (1913) I.L.R. 38 M. 456=25 M.L.J. 297

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1. (1909) 19 M. L. J. 757.
2. (1912) I. L. R. 38 Mad. 6.
3. (1913) I. L. R. 38 Mad. 456.
4. (1915) 30 I. C. 683.

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Sadasiva Aiyar, J.

after the drains cannot prevent the enjoyment by the Municipality of the drains as drains so long as they are carrying off the street rain water and hence no adverse possession has been established.

The second question is whether even if the drain space ceased to be vested in the Municipality as a drain, the plaintiffs could obtain an injunction against the removal of the encroachment over the drain space or whether they could only claim compensation. The Municipality's power to remove encroachment over what was once a drain is a question on which conflicting opinions were expressed in *Mothe Achayya Garu* v. *Municipal Council of Ellore* [1] and *Corporation of Madras* v. *Mohan Lal Sowcar* [2]. That question need not be gone into in these cases though I may be permitted to say that I adhere to the opinion expressed in *Corporation of Madras* v. *Mohan Lal Sowcar* [2] with the greatest respect to the contrary opinion expressed in *Mothe Achayya Garu* v. *Municipal Council of Ellore* [1].

In the result these second appeals are dismissed with costs. I would allow Rs. 340 as Vakils' fee for all the 17 cases at Rs. 20 a case.

Burn, J.—I agree.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE KRISHNAN.

S. R. M. S. Chokkalingam Chetty ... *Appellant** (*counter petitioner-plaintiff.*)
v.
N. L. N. Lakshumanan Chetty ... *Respondent* (*petitioner-1st defendants.*)

Chockkalingam Chetty
v.
Lakshmanan Chetty.

Civil Procedure Code O. 9 R. 13 and O. 47 Rr. 1 and 7—Exparte decree—Application for review—Omission to apply under O. 9 R. 13—Effect of—Time taken in obtaining copies—Deduction of—Appeal against order granting review—Grounds for.

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* A. S. O. No. 209 of 1919. 11th December, 1919.

[1] (1909) 19 M. L. J. 757.

[2] (1915) 30 I. C. 683.

It is open to a party to apply for review of an *ex parte* judgment and decree on any of the grounds specified in O. 47 R. 1 of the C. P. Code. His omission to apply under O. 9 R. 13 of the C. P. Code to set aside the *ex parte* decree is no bar to the maintainability of the application for review.

Under S. 12 (2) of the Limitation Act the time spent in obtaining a copy of the judgment sought to be reviewed can be deducted in computing the period of limitation prescribed by art. 178.

An order granting a review is open to appeal only on the grounds specified in O. 47 R. 7 (1) of the C. P. Code.

Appeal against the order of the Court of the Temporary Sudordinate Judge of Sivaganga dated 29th March 1919 in I. A. No. 301 of 1916 (in O.S. No. 77 of 1915 on the file of the Court of the Temporary Subordinate Judge of Sivaganga.)

A. Krishnaswami Aiyar and *A. Venkatarayaliah,* for Appellants.

T. M. Krishnaswami Aiyar and *V. Ganapathi Aiyar*, for Respondents.

The Court delivered the following

Judgment:—The first point taken is that no review can be granted on grounds falling within O. IX R. 13 of the Code of Civil Procedure and a party's remedy in such a case is confined to that rule, and as time had admittedly expired in the present case for an application to set aside the *ex parte* decree under that rule when the review application was filed, it should have been dismissed. We are unable to uphold this contention. If a party can bring his application within the provisions of O. 47 R. 1 of the Code of Civil Procedure, the fact that he could also have applied under O. IX R. 13 cannot be treated as a bar to it. See *Lal Chet Narain Sahi* v. *Rampal Manjhi* [1] following *Raj Narain Purkait* v. *Ananga Mohan Bhandari* [2]. We follow these rulings in spite of the dissent of Mr. Justice Roe in *Deodip Singh* v. *Gopal Singh* [3]. In *Virupakshi Gowd* v. *Bandappa* [4] the view of that learned Judge was not accepted by this Court. It has been ruled by this court in Full Bench in *Krishna Aiyar* v. *Kuppan Ayyangar* [5] that a party's right of appeal is not affected by the fact that he had a right under O. IX R. 13 also which he did not take advantage of and that it is open to the appellate court to set aside the *ex parte* decree and direct a new trial on grounds falling within O. 9 R. 13 of the Code of Civil Procedure. If an appeal can be allowed in that manner we see no reason to suppose that a review cannot be allowed on similar grounds.

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[1] (1911) 16 C. W. N. 643.
[2] (1899) I. L. R. 26 Cal. 598.
[3] (1916) 1 P. L J. 547.
[4] (1919) 37 M. L. J. 59.
[5] (1906) I. L. R. 30 Mad. 54.

The next point taken is as to limitation. The review was no doubt filed after the expiry of 90 days from the date of the decree but it is clear from the express language of S. 12 (2) of the Limitation Act that the petitioner was entitled to have deducted in his favour, the time taken for obtaining the copy of the judgment on which this review was founded. It was admitted in the lower court that on making this deduction the application was in time. We must therefore overrule this objection.

It was finally argued that on the merits there was no ground for setting aside the *ex parte* decree as petitioner was served in person and could have appeared at the hearing with some diligence. He was living in Ipoh in Federated Malay States when he was served and the lower court has found that he had sufficient reason for his failure to appear. We agree with that finding. We also observe that it is not one of the grounds which can be urged under O. 47 R. 7 in an appeal, from an order granting a review. See *Tholan* v. *Kunhikutty* [1], *Maduru Brahmayya* v. *Vedula Vellamma* [2] and *Sreenivasa Aiyar* v. *Nataraja Aiyar* [3].

The appeal fails and is dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTIC ABDUR RAHIM AND MR. JUSTIC AYLING.

Agnihotram Narasimhacharulu and others ... *Appellants**
(*Defendants 1 to 8.*)

v.

Soma Pitchayya and others ... *Respondents*
(*Plaintiffs 1 to 4.*)

Narasimhacharulu v. Pitchayya.

Specific Relief Act, S. 42—Suit by worshippers for a declaration that alienation of temple properties is invalid—Maintainability of—C. P. Code O. 1, R. 8.

It is competent to the worshippers of a Hindu temple to sue under O. 1 R. 8 of the C. P. Code, for a declaration that a permanent lease of the temple properties in favour of the defendants is invalid and not binding on the trust.

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* Appeals Nos. 306, 319 and 343 of 1918. 27th November, 1919.

[1] (1912) 24. M. L. J. 93.

[2] (1916) 31. M. L. J. 509.

[3] (1915) 2. L. W. 366.

Appeals against the decrees of the Court of the Temporary Subordinate Judge of Masulipatam in O. S. Nos. 19, 66 and 67 of 1917 respectively.

P. Narayanamurthi and *K. Kamanna*, for Appellants.

P. R. Ganapathi Aiyar, *V. Ramadoss* and *V. Krishna Mohan*, for Respondents.

The Court delivered the following

Judgment:—*Appeal No.* 306 *of* 1918:—The finding of the Subordinate Judge that the property belonged to the God installed in the temple is supported by strong evidence. Exhibit A itself says that the gift was to the God Gopalaswami. Similarly there is no reason to doubt the correctness of the finding that both the warams belonged to the temple.

This appeal is dismissed with costs.

Appeal Nos. 319 *and* 343 *of* 1918.

The question is whether the worshippers of a temple can bring a suit for a declaration that a permanent lease granted to the defendants who are Archakas in possession of the property is invalid, under O. 1 R. 8 of the Code of Civil Procedure.

The objection urged by the appellants is that a suit for a declaration must conform to the terms of S. 42 of the Specific Relief Act; and since the worshippers as a body or their representatives under O. 1 R. 8 cannot be said to have any right as to property within the meaning of S. 42 of the Specific Relief Act, the suit is not maintainable. No authority has been cited for the appellants in support of this proposition ; on the other hand the ruling of the Privy Council in *Robert Fisher* v. *The Secretary of State for India in Council* [1] suggests that S. 42 of the Specific Relief Act is not exhaustive of cases in which declaratory suits may be maintained and it was held by the Full Bench of this Court, in *Venkataramana Aiyangar* v. *Kasturi Ranga Aiyangar* [2] that such a suit as this was maintainable though the question whether it came within the provision of S.42, of the Specific Relief Act was not raised then. There is also a ruling of this Court reported in *Chidambaranatha Thambiran* v. *Nallasiva Mudaliar* [3] where a suit by the desciples of a mutt was held to

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[1] (1898) I. L.R. 22 Mad. 270. [2] (1916) I.L.R. 40 Mad. 212=31 M. L. J. 777.

[3] (1917) I. L. R. 41 Mad. 124=33 M. L. J. 357.

Narasimhacharulu v. Pitchayya.

be maintainable under O. 1 R. 8 for a declaration as to the invalidity of an alienation of the mutt property. We hold that the suit was maintainable. Appeals No. 319 and 343 of 1018 are dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— MR. JUSTICE SPENCER AND MR. JUSTICE BAKEWELL.

Bhavirisetti Gopalakrishnayya ... *Petitioner** (*Counter-Petitioner No. 1*).
v.
Pakanati Pedda Sanjeeva Reddi and another ... *Respondent* (*Petitioner and Counter-Petitioner No 2.*)

Gopalakrishnayya v. Sanjeeva Reddi.

Civil Procedure Code O. 21 *R.* 90—*Auction-purchaser—Right to apply to set aside the execution sale.*

An auction purchaser at an execution sale is a person "whose interests are affected by the sale" within the meaning of O. 21 R. 90 of the C. P. Code and he can apply to set aside the sale on any of the grounds specified in that rule.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the District Court of Guntur in C. M. A. No. 27 of 1917, preferred against the order dated 27th March 1917, of the Court of the Principal District Munsif of Guntur in C.M. P. No. 52 of 1917 in E. P. No. 654 of 1916 in O. S. No. 874 of 1913.

B. Somayya, for Petitioner.

V. Lakshminarayana, for Respondents.

The Court delivered the following

Judgment :—The only question to be decided is whether an auction-purchaser is a person "whose interests are affected by the sale" within the meaning of O. 21, R. 90 of the present Code of Civil Procedure. These words did not occur in the Code of 1882 and the question is therefore one of first impression, so far as auction-purchasers are concerned. Under O. 21 R. 91 an auction-purchaser may apply to the Court to set aside, a sale on the ground that the judgment-debtor had no saleable interest, but these words do not go far enough to meet the case of auction-purchasers who have been misled by a statement inserted through error or fraud in the proclamation of sale to the effect that the property to be sold is unencumbered.

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* C. R. P. No. 109 of 1919. 28th November, 1919.

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Krishnayya
v.
Sanjeeva
Reddi.

There can be no doubt that, if an application is made under O. 21, R. 92 to set aside a sale, an auction-purchaser is entitled to notice of the application as being a person "affected" thereby. In this respect, the practice of giving notice to auction-purchasers has received the approval of the Privy Council (See *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* [1].

If an auction-purchaser's interests are affected by an order setting aside the sale, it is difficult to see why his interests are not also affected by the sale, although it is true that they are affected in a different sense and in a different degree. In one case, he stands to lose an interest acquired by the sale, in the other, he acquires an interest which he did not possess previously. We have not been shown any reason for confining the word "interests" in rule 90 to the narrow meaning of interests in existence prior to the sale so as to exclude interests created by the sale.

In *Kala Mea* v. *Hasperink* [2] the Privy Council have laid stress upon the duty of Courts to see that in sales held under their direction, nothing is done to mislead purchasers into the belief that properties for which they bid are free from encumbrances, when, if the truth were known, it would appear that they were properties of little or no value on account of their being heavily encumbered. The present is a case in which the respondent was equitably entitled to have the sale set aside as being an unfair bargain into which he was induced to enter by misrepresentation and we think that the Courts below were right in their opinion that the words of the Code are wide enough to provide a remedy for such a case in execution.

We therefore confirm the order appealed against and dismiss the appeal with costs.

A. V. V.

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[1] (1892) I. L. R. 19 Cal. 683 [2] (1908) I. L. R. 36 Cal 323 (P. C.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR ABDUR RAHIM, OFFICIATING CHIEF JUSTICE, MR. JUSTICE SPENCER AND MR. JUSTICE KRISHNAN.

K. V. Subrahmania Aiyar ... *Petitioner* (*Respondent.*)

v.

The District Magistrate of Salem. ... *Respondent.*

Subramania Aiyar. v. The District Magistrate of Salem.

Legal Practitioners Act, Ss. 13 (f) and 14—Pleader—Criticism of criminal administration of a district—Publication in newspaper—Disciplinary action against pleader, if justifiable.

The phrase "any other reasonable cause" in S. 13 (f) is not restricted to professional misconduct in the ordinary sense but covers other misconduct which unfits a pleader for the practice of the profession, *e. g.*, conviction for a crime involving dishonesty or moral turpitude or gross and habitual contempt of court. Where, however, a pleader as a member of the public, criticises through the medium of a newspaper the administration of criminal justice in a particular district, he does not render himself liable to disciplinary action under S. 14 of the Legal Practitioners Act, even though such criticisms may, on enquiry, be found to be unjustified and to exceed the limits of fair comment.

Petition under S. 105 of the Government of India Act praying the High Court to revise the order of the Court of the District Magistrate of Salem dated 6th September 1919 framing certain charges against the petitioner under S. 14 of the Legal Practitioners Act.

T. Rangachariar, for the Petitioner.

The Hon. The Advocate-General and *the Public Prosecutor,* for the Respondent.

The Court made the following

Abdur Rahim, O. C. J.

Order :—*The Officiating Chief Justice.*—Mr. K. V. Subrahmania Aiyar, a First Grade Pleader practising in the Salem District has been called upon by the District Magistrate of Salem to show cause why he should not be proceeded against under S. 14 of the Legal Practitioners Act with reference to certain statements which occurred in an article contributed by the pleader to the newspaper "New India" on the 15th August 1919. The gist of the article is to show that the present administration of criminal justice by the Subordinate Magistracy in the Salem District was not satisfactory. The general complaint was that the present District Magistrate had issued a number of circulars to the Subordinate Magistrates with reference to the granting of adjournments, which fettered the discretion of the Subordinate Magistrates in dealing with the cases before them properly. The statements subject matter of the charge are : (a) "The magistrates were allowed great latitude to exercise their discretion and judgment unfettered by Police Orders or quick despatch circulars. The cases were allowed to take their own course in appeal or revision (that was before the time of the present District Magistrate). The present holder of the office (*i.e.*, the District Magistrate) has issued various mandates for the guidance of the magistracy in the matter of adjournments, grants of copies and disposals."

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* C. R. P. No. 596 of 1919. 14th October, 1919.

Then statement (b) is, "The Police ask for transfers from the files of the Magistrates who grant bails to the accused and the letter of the District Superintendent carried great weight." Then the next extract is to this effect, (c) "where the question for adjournment comes, the Court solemnly consults the circulars and ukases issued from the District Magistrate's office fixing the number of days and hours for summons, warrant and Sessions cases and the convenience of the prosecuting staff."

It is charged that these statements are false and scandalous, made with the intention of bringing the office of District Magistrate and the Subordinate magistracy into contempt.

It is argued by Mr. Rangachariar who appeared for Mr. Subrahmania Aiyar that the statements charged against his client are nothing but fair comment on the administration of criminal justice in the District of Salem and that they do not come within the purview of S. 13 of the Legal Practitioners Act. It is conceded by the learned Advocate-General who appeared for the District Magistrate that the statements in question do not fall within clauses (a) to (e) of the section. But he urges that they come within the purview of the residuary clause (f) *i. e.*, "any other reasonable cause." It has been ruled that the phrase "any other reasonable cause" is not to be understood in an *ejusdem generis* sense, but that it covers cases other than those of professional misconduct in the ordinary sense but which unfit a pleader or the practice of his profession ; for instance, conviction for a crime involving dishonesty or moral turpitude or gross and habitual contempt of court would be covered by the general clause. The learned Advocate-General has especially relied on the case *In the matter of a pleader* [1]. There the pleader had written a letter to an officer who was conducting an inquiry into a charge of bribery against a Revenue Inspector, the letter containing allegations which were intended to prejudice the mind of the officer in connection with the matter which he was investigating. That was held to come within the words "any other reasonable cause." That seems to me was a fairly clear case; for a lawyer to attempt to cause miscarriage of justice by a letter of that character would, if not strictly professional misconduct, undoubtedly be such as to make him unfit to continue to practise the profession. The next case relied on is *In the matter of Rasik Lal Nag* [2]. There a pleader had a quarrel with an officer of the Court in the Court premises and seriously threatened and abused him. That was held to be contempt of Court although the act was not committed in the actual presence of the Judge, and that it came within clause (f) of S. 13. What the learned Judges held was that the conduct of the pleader amounted to obstructing the course of administration of justice in the particular case in connection with which he threatened the officer of the Court. *In the matter of Sashi Bhushan Sarbadhicary* [3], another on case which the learned Advocate-General emphasises, an Advocate of the Court quarrelled with a learned Judge of the Allahabad High Court before whom he was conducting a case and then published an article in a newspaper which amounted to a serious contempt of Court. That was not the first time, as pointed in the Privy Council, when the matter went on appeal, that the Advocate had behaved in such an unseemly manner. Their Lordships held that the High Court was justified in taking a disciplinary action against the advocate and say "on the other hand, it is essential to the proper administration of justice that unwarrantable attacks should not be made with impunity upon Judges in their public capacity; and having regard to the fact that in this case a contempt of Court was undoubtedly committed (and as the evidence shows not for the first time) by an advocate in the matter concerning himself personally in his professional character. Their Lordships agree with the conclusion at which the Judges of the High Court arrived, and there was "reasonable cause" for the order which they made." Then they cite with approval the following dictum of Lord Westbury in *In re Wallace* [1]. "It was an offence . . . . . committed by an individual in his capacity of a suitor in respect of his supported rights as a suitor, and of an imaginary injury done to him as a suitor; and it had no connection whatever with his professional character or anything done by him professionally either as an advocate or as an attorney."

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[1] (1902) I.L.R. 26 Mad 448.

[2] (1916) I. L. R. 44 Cal. 639.

[3] (1906) I. L. R. 29 All. 95. (P. C.)

In the case of *The District Judge of Kistna* v. *Hanumanulu* [2] the conduct of the Pleader which was held to bring him within S. 14 of the Legal Practitioners Act was with reference to statements contained in an affidavit filed in a particular case. The learned Advocate-General has not been able to cite before us any case in which comments made on the administration of justice generally in a particular district or in a particular court has been held to amount to misconduct within the meaning of S. 13. On the other hand, there are authorities to the effect that where a Pleader makes imputations against a particular Judge in the capacity of a suitor, that would not bring him within the disciplinary action of the Court. That was the case in *In re Wallace* [1] to which reference has already been made and I might here refer to another passage in the judgment of Lord Westbury where he says: "When an offence was committed which might have been adequately corrected by that punishment, and the offence was not one which subjected the individual committing it to anything like general infamy, or an imputation of bad character, so as to render his remaining in the Court as a practitioner improper, we think it was not competent to the Court to inflict upon him a professional punishment for an act which was not done professionally, and which act *per se*, did not render him improper to remain as a practitioner of the Court." That seems to me to be the proper principle to be applied in cases of this character.

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[1] (1866) L. R. 1 P. C. 283.

[2] (1915) I. L. R. 39 Mad. 1045.

The question then is whether these statements are such as to render it improper that Mr. Subrahmnia Aiyar should remain in the profession. We have read the entire article from which these passages have been extracted. There are certain statements in that article which contain specific charges against the subordinate magistracy in the District of Salem so far as their methods and conduct in trying criminal cases are concerned. But those statements are not included in the charges framed by the District Magistrate. In writing that article the Pleader cannot be said to have acted professionally. He acted as a member of the public and he thought that he was bringing to the notice of the public an important matter concerning the administration of justice in that district. It is quite possible that some of the statements contained in that article exceeded the limits of fair comment and that the statement cited in the charge contain reflections on the way in which cases are tried in the District of Salem by the subordinate magistrates suggesting that certain circulars issued by the District Magistrate have the effect of influencing the subordinate magistrates and that miscarriages of justice sometimes occur in consequence. It is possible that the pleader has drawn inferences which are not accurate from the fact that those circulars were issued; but we cannot reasonably hold that the statements which form the subject-matter of the charge or the repudiations contained therein are of such a nature that they would render the pleader unfit to continue in the profession and bring him within the disciplinary jurisdiction of the Court.

The remedy provided by S. 14 of the Legal Practitioners Act is not intended to apply to cases in which a Pleader as an ordinary member of the public criticises the administration of justice generally in a particular district even though such criticisms may on enquiry be found not to be wholly justified without attempting to define the classes of cases covered by the phrase "any other reasonable cause" I think that that clause of S. 13 of the Legal Practitioners Act cannot be properly utilised in punishing a pleader for making comments on matters of public interest in the newspapers merely because such comments exceed the limits of fairness or accuracy. The proceedings therefore under S. 14 the Legal practitioners Act against Mr. K. V. Subrahmania Aiyar must be quashed.

It thus becomes unnecessary to deal with the other prayer of the petition that the enquiry should be transferred to another Judicial Officer.

Spencer, J.

Spencer, J.—I agree with the learned Chief Justice for the reasons given by him that the pleader was not acting in a professional capacity or in connection with any particular case, when he wrote the letter which is the subject of the present charge.

Assuming for the purpose of argument that some of the statements in the letter were defamatory of the District Magistrate and the subordinate magistrates of Salem District, that fact will not in itself necessarily imply such moral turpitude in the character of the pleader as to make him unfitted to carry on his profession of pleader. Reluctant as we must ordinarily be to stifle an enquiry at a stage before it is known what the evidence that remains to be taken will establish, I can conceive no purpose to be gained by allowing the proceedings to be continued on the charges now framed, and it will not be proper that the enquiry should travel beyond those charges. I therefore agree that the proceedings should be annulled.

Krishnan, J.

Krishnan, J.—I agree with the judgment just delivered by the learned Chief Justice. The case is one that arose under S. 14 of the Legal Practitioners Act. That section deals first of all with "taking instructions except as aforesaid" that is as stated in S. 13 (a) and then it speaks of "such misconduct as aforesaid." That has been held to mean any misconduct that would fall under any of the clauses (b), (c), (d), (e) and (f) of S. 13 in the Full Bench ruling in *The District Judge of Kistna* v. *Hanumanulu* [1] which I respectfully follow.

In the present case the Advocate-General who appears for the District Magistrate has conceded that he could not bring this case under any of the clauses of S. 13 except the last clause (f) which speaks of "any other reasonable cause." These words are very general; and as pointed out by their Lordships of the Privy Council *In the matter of Sashi Bhushan Sarabadhicary* [2] with reference to similar words in the

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[1] (1915) I. L. R. 39 Mad. 1046.

[2] (1906) I. L. R. 29 All. 95. (P. C.)

Letters Patent, it is not desirable to try and define what would be reasonable cause. I do not propose to attempt to do. It has been held by the Full Bench in *The District Judge of Kistna* v. *Hanumanulu* [1] that the clause (f) should not be read in an *ejusdem generis* sense with the other clauses following certain rulings of the Allahabad and the Calcutta High Courts which are cited there. I do not consider that the case. *In the matter of Sashi Bhushan Sarbadhicary* [2] has thrown any real doubt upon the view expressed in the Full Bench case that clause (f) includes misconduct other than professional and I am prepared to follow that view, But I think in considering whether any particular charge against a pleader falls within the terms " any other reasonable cause" in clause (f), we should bear in mind the scope of the Act which is one dealing with the Legal Practitioners as such and the object of the inquiry that is to be held under S. 13 or S. 14 which is to see whether the pleader should be suspended or dismissed from practice for misconduct. I think it is necessary to bear this in mind when deciding whether any particular case falls within S. 13 or S. 14 of the Act. The misconduct should therefore be in my opinion such as would render the continuance of the pleader in practice an undesirable thing to be allowed or is so dishonourable or so dishonest as to unfit him from being a member of the profession permanently or temporarily, before it should be held to fall within clause (f). Though misconduct other than professional, may fall under clause (f) its impropriety has to be considered with reference to the pleader's professional capacity and it is only if the misconduct can reasonably be held to affect it that it would fall within clause (f) as the Act deals with a pleader only in his professional capacity and not in his private capacity as already pointed out above.

As regards the particular case before us, the learned Chief Justice has already set out in his judgment the three passages which form the subject-matter of the charge against the pleader. They appeared in a letter written by the pleader to the " New India " and published under his own name. I am in agreement with the learned Chief Justice that the publication of those statements made by the pleader which have been referred

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[1] (1915) I. L. R. 39 Mad. 1045.

[2] (1906) I. L. R. 29 All. 95 (P. C.)

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Krishnan, J.

to is not such an act as would fall under clause (f) as it is not in my opinion a misconduct when considered with reference to his position as a pleader. He cannot properly be suspended or dismissed for unfitness or otherwise punished professionally for it.

The case cited by the learned Advocate-General on the one side and by Mr. Rangachariar on the other side have been considered by the Chief Justice in his judgment and I do not propose to deal with them at length. Each case, it seems to me, has to be decided on its own facts. No case similar to the present one where a pleader has been dealt with under the Legal Practitioners Act because he wrote in a paper commenting upon the supposed undesirable state of criminal administration in any particular district or Presidency has been brought to our notice. In all the cases cited by the Advocate-General it would be noticed, as pointed by the learned Chief Justice, that the case arose with reference to some particular suit or proceeding before the Court in which a pleader appeared in his professional capacity except in the case in *the matter of a Pleader* [1]. That, however, was a case in which the pleader attempted by sending an anonymous petition to the Sub-Collector making certain allegations to interfere with the course of justice in the case before him. Although the pleader there apparently had no professional relationship with the case before the Sub-Collector, his conduct was certainly so grossly improper when considered with reference to his position as a pleader as to necessitate his being suspended from practice to bring home to him the impropriety of what he did. That case really has no bearing on the present case because the facts to be considered in this case are very different. The Full Bench case in *The District Judge of Kistna* v. *Hanumanulu* [2] was a case in which the learned Chief Justice who delivered the judgment thought that it would probably fall under clause (b) of S. 13; and though the actual charge was under clause (f) the misconduct there was something closely connected with the discharge of the pleader's professional duty in the case that was before the Court. The cases relied on by the Advocate-General are thus all distinguishable from the present case; and on the merits of this case I have come to the conclusion as I have said already that the charges are not such as would properly fall under S. 14 as the pleader's statements were made in a letter to the public press as a correspondent and are really only comments on the general administration of the District. I agree that comments made in the press even though they may overstep the bounds of fairness and may not be strictly in accordance with facts, are not matters necessarily to be dealt with under the disciplinary jurisdiction given by the Legal Practitioners Act. I therefore agree in the order proposed by the learned Chief Justice that the proceedings before the District Magistrate should be annulled.

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[1] (1902) I. L. R. 26 Mad. 448.

[2] (1915) I. L. R. 39 Mad. 1045.

As regards the second point taken as to whether the High Court has got the right of transferring proceedings under S. 14 from the Presiding Officer to any other officer, there is a ruling of this Court in *In re a Pleader* [1] against it, and also a ruling in *In the matter of Janak Kishore and others*[2] to the same effect. It is however a question of some difficulty to decide whether the High Court has the power of transfer under the Letters Patent or the Government of India Act (*Lolit Mohan* v. *Surja Kanta Acharjee* [3])with reference to cases under S. 145 of the Criminal Procedure Code and whether if it has such power it has been taken away by implication by the language of S. 14 of the Legal Practitioners Act with reference to the proceeding under it. But as under S.13 the High Court is entitled to order an enquiry itself, the question of transfer is not of importance as it would be open to us if we thought that the District Magistrate was not the right person to conduct the present enquiry to stay proceedings before him and to order an enquiry under S. 13 to be held by an officer chosen by us. But on the view we have taken on the merits this question does not require a decision and I do not express a definite opinion on it. I agree to the order proposed by the learned Chief Justice.

A. V. V.

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1. (1907) 18 M. L. J. 184. 2. (1916) 1 Pat. L. J. 576.
3. (1903) I. L. R. 28 Cal. 709.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE OLDFIELD, AND MR. JUSTICE SESHAGIRI AIYAR.

A. A. R. Ponnambala Pillai, and others... *Appellants*Defendants Nos.* 1 *to* 3 *and* 6).

v.

Annamalai Chettiar (dead), and others ... *Respondents (Plaintiff and 4th defendant and L. R. of the plaintiff and L. R. of the 4th defendant).*

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Mortgage—Purchase by the mortgagee of the equity of redemption in part of the mortgaged property—Value of the property purchased, equal to the amount due on the mortgage—Whether purchase has the effect of discharging the mortgage—Transfer of Property Act s. 60 *and* 82

When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing only that portion of the mortgage debt which was chargeable on the property purchased by him; *i. e.*, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the entire property comprised in the mortgage—even though the value of the property purchased be equal to the amount due on the mortgage.

Sami Row Appa v. *Kuppuswami Aiyangar* [1], overruled.

Bisheswar v. *Ram Dayal* [2]. *Nawab Azmut Ali Khan v Jawahir Singh*[3] followed.

Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in Original Suit No. 42 of 1915.

The case came on for hearing before Abdur Rahim and Oldfield JJ who made following.

ORDER OF REFERENCE TO A FULL BENCH :—

This appeal arises in a suit on a mortgage bond by which three items of property were mortgaged to the plaintiff. Out of the three items two items were sold in execution of a Small Cause Court decree and bought by a person who was found to be an agent of the plaintiff. The purchase money paid for both the properties was Rs. 200. The plaintiff now seeks to realise the amount due to him from the third item, and the question of law that arises is whether he ought to give credit to the mortgagor for the full value of the two items purchased by him and proceed against the other property only for the balance.

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* A. No. 190 of 1917. 27th January, 1920.

[1] (1911) (2) M. W. N. 42.

[2] (1900) 22 All. 284

[3] 13 M. I. A. 404.

As regards the value of the properties purchased it has been argued for the appellants that the learned Subordinate Judge's estimate is not correct, but we are unable to agree with this contention. It is not necessary to go into the details but it is sufficient to mention the fact that the plaintiff sold the property three years afterwards for Rs. 3,750 except the roofing of the house. We think the Subordinate Judge is right in accepting that figure. As regards the other properties there is no reason to doubt the correctness of the valuation.

Before we deal with the question of law raised by the appellant it is convenient to dispose of the memoranda of objections. The bond provides for the payment of 15 per cent simple interest, in default of payment at the specified date, compound interest with one yearly rests at 18 per cent. We think the Subordinate Judge has rightly held this to be penal and we are unable to say that 18 per cent. simple interest allowed by him is not sufficient compensation.

Upon the question of law there is one ruling of this Court in *Sami Rowappa* v. *Kuppusami Iyengar* [1]. There it has been held by Ayling and Spencer, JJ that where a mortgagee purchases one out of two properties subject to the mortgage if the value of the property purchased is equal to or exceeds the mortgage amount then the mortgage debt must be taken to be satisfied. In coming to this conclusion they followed the ruling of the Allahabad High Court in *Nand Kishore* v. *Raja Hariraj Singh* [2]. That was a ruling by a Full Bench of that Court of which Blair and Banerji, JJ were members. There it was held that the purchase of a part of the mortgaged property by the mortgagee subject to his mortgage has not necessarily the effect of fully discharging the mortgage without regard to the value of the property purchased and the price paid for it, whether such purchase be made in execution of a simple decree for money or in execution of a decree obtained by the mortgagee himself upon a subsequent

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[1] (1911) 2 M. W. N. 842.

[2] (1897) I. L. R. 20 All. 28.

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mortgage, although it is possible that under some circumstances such purchase may have the effect of extinguishing the mortgage. The view suggested is that if the value of the property purchased is equal to or exceeds the amount of the mortgage debt then the mortgage must be held to be satisfied. But in a later Full Bench decision of the same Court in *Bisheshur Dial* v. *Ram Sarup*[1] a different proposition was laid down after a full consideration of the authorities, and it should be noted that Blair and Banerji, JJ. the latter of whom delivered the judgment of the Full Bench, were parties to this decision. The head note is in these words : "When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage." In coming to this conclusion they mainly proceeded on the provisions of S. 82 of the Transfer of Property Act which lays down that where several parcels of property are mortgaged to secure one debt, every parcel is liable for the whole amount of the debt; but as between themselves each parcel is liable, in the absence of a contract to the contrary, to contribute to the debt in the proportion which its value bears to the value of the whole property comprised in the mortgage. They point out that if the property had been bought by a stranger then it could not be contended that that property in his hands would be liable for a larger amount than what would be proportionate to its value. It may be observed that S. 82 of the Transfer of Property Act was not brought to the notice of the learned Judges who decided *Nand Kishore* v. *Raja Hariraj Singh* [2] or of Ayling and Spencer, JJ. who decided the Madras case *Sami Rowappa* v. *Kuppusami Iyengar* [3]. There is also a ruling of the Bombay High Court in *Lakshmidas* v. *Jamnadas* [4] in support of the view taken in *Bisheshur Dial* v. *Ram Sarup* [1].

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[1] (1900) I. L. R. 22 All. 284.

[2] (1897) I. L. R. 20 All. 23.

[3] (1911) (2) M. W. N. 342.

[4] (1896) I. L. R. 22 Bom. 304.

But the learned Advocate General has referred us to a decision of the Privy Council in *Dulichand* v. *Ramkishen Singh* [1]. The facts of that case are somewhat complicated. But it would be sufficient to mention that the plaintiffs there, were the purchasers of a Mouza called Korina and they also stood in the shoes of the Bank of India which held the first encumbrance on that Mouza. The appellant, the defendant in the suit, held a mortgage both of Korina and the Mouza Nandan, the mortgage on the Mouza Korina being a second mortgage and that on Nanda being the first mortgage. It appears that the appellant bought Mouza Nandan and it was found that the value of that property after deducting the purchase money of the equity of redemption exceeded the mortgage debt due to the appellant. Upon these facts the Privy Council held that the appellant's mortgage was satisfied and that therefore he could not proceed for any portion of the mortgage amount against the Mouza Korina. At page 651 their Lordships say "It has been found by the Courts that its value, beyond the purchase-money, exceeded the amount due upon the appellant's mortgage, and was sufficient to cover not only that amount, but the Rs. 19,416 due to Lutf Ali Khan, if that sum was really due to him. Under these circumstances, it must be taken that the mortgage-debt was satisfied by the purchase of Nandan and the value of that estate". At page 653 they say. "It has been shown that at the time that this payment of Rs. 78,393 was made by the respondents to the appellant, the debt had been satisfied by his purchase of Nandan under the circumstances above stated. He has, therefore, received it twice over, and it is obvious that, in such a case it is inequitable that he should hold the money paid to him under compulsion, by the respondents. It is to be observed that the appellant had only a second mortgage upon Korina, but in the view their Lordships have taken of the case, it is unnecessary to go into the question of marshalling the securities." If their Lordships had satisfied themselves with saying that the appellant's mortgage on Korina was a second mortgage and therefore postponed to the mortgage of the bank it could not be contended there would be any conflict between this decision and the ruling in *Bisheshur Dial* v. *Ram Sarup* [2]. But that is

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[1] (1881) I. L. R. 7 Cal. 648.

[2] (1900) I. L. R. 22 All. 284.

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apparently not the ground on which they based their conclusion. They held that upon the facts stated by them in their judgment the appellant's mortgage was satisfied because of the value of the property having exceeded the debt. It must however be observed that the question whether the plaintiffs were entitled or not to proceed against the other Mouza for a proportion of the debt was not at all discussed at the bar and this case, as the head note itself would show, is regarded as an authority with reference to another question as to whether payment made by a person to save his property threatened to be sold in execution of a decree is a voluntary payment or not and not upon the present question. The matter is one of some importance and the correctness of the ruling in *Sami Rawappa* v. *Kuppusami Iyengar,*[1] seems to be open to doubt. We therefore think that the question ought to be settled by a Full Bench of this Court, whether, when a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing the mortgage debt if the value of the property purchased be equal to the amount due on the mortgage decree as held in *Sami Rowappa* v. *Kuppusami Iyengar* [1] or whether the true rule is as enunciated in *Bisheshur Dial* v. *Rama Sarup* [2].

The Hon. The Advocate General (*S. Srinivasa Aiyangar*) for the appellants. When a mortgagee purchases a portion of the mortgaged property there is a merger of the mortgage right and the equity of redemption and as such he will be bound to account for and apply the full value of the properties purchased by him in liquidation of his debt in as much as the mortgagee is entitled only to recover the debt and not to any of the properties. So really the question of contribution which arises between mortgagors and their representatives in interest cannot apply to the case of a mortgagee purchaser. No doubt if the purchase is tainted with fraud, then the mortgagor will be entitled to repudiate the sale and seek to redeem the whole property and this is the only right which the mortgagor loses if there is no fraud. The mortgagor will be entitled to the full credit of the entire value of the property purchased by the mortgagee. This is the

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[1] (1911) 2 M. W. N. 342.

[2] (1900) I. L. R. 22 All. p. 284.

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principle adopted in *Dulichand* v. *Ram Kishen* [1] and also in *Sami Rowappa* v. *Kuppusami Aiyangar* [2]. No doubt another equitable principle has been laid down in *Bisheswar Dial* v. *Ram Swarup* [3] and the cases following it namely, that in the absence of fraud the purchase of a portion of the hypotheca by the mortgagee has the effect of extinguishing the mortgage debt only to a fraction equivalent to the proportion which the property purchased bears in value to the other mortgaged properties. In all these cases S. 82 of the Transfer of Property Act has been applied which clearly has no application to the case of a mortgagee purchaser. So the other equitable principle laid down in *Dulichand* v. *Ram Kishen* [1] ought to be applied to the case of a mortgagee purchaser. In *Nawab Azmut Ali Khan* v. *Jawahir Singh* [4] the present question did not arise as the claim there was only to a proportionate abatement and as there was no evidence that the value of the properties purchased was more than the mortgage amount.

K. Bhashyam Aiyangar and *K. Narasimha Aiyangar* for the third Respondent. A distinction is made between a third person purchaser and a mortgagee purchaser of the equity of redemption in some of the mortgaged properties ; such a distinction is unfounded, see *Nawab Azmut Ali Khan* v. *Jawahir Singh* [4]. The principle is clearly stated by the Privy Council in that case. *Dulichand* v. *Ram Kishen* [1] is clearly distinguishable because the amount of the first mortgage was more than the full value of Mowza Korina and therefore there was nothing left for the second mortgage to operate upon in Korina. So the second mortgagee had only the other property Nandan to proceed against.

In *Nilakant Banerji* v. *Sureshchandra Mullick* [5] the case in *Nawab Azmut Ali Khan* v. *Jawahir Singh* [4] is relied on for this question. *Dulichand* v. *Ram Kishen* [1] has never been relied on on the question of contribution in cases of mortgages.

See also *Krishna Aiyar* v. *Muthukumaraswamiya* [6] and *Perumal* v. *Raman Chettiar* [7]. If *Dulichand* v. *Ram Kishen* [1] is

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[1] (1881) I.L.R. 7 Cal. 648

[2] (1911) 2 M. W. N. 842.

[3] (1900) I. L. R. 22 All. 284 (F. B.)

[4] 13 M. I. A. 406.

[5] (1885) I. L. R. 12 Cal. 414 at 422, 423.

[6] (1905) I. L. R. 29 M. 217.

[7] (1917) I. L. R. 40 M. 968,974.

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down any proposition of law as contended on the other side, after S. 60 and 82 of the Transfer of Property Act, it is no longer law. Fisher on mortgages Ss. 1937 and 1938. *Knight* v. *Marjoribanks* [1] lays down that the relation between mortgagors and mortgagees is such that a sale by mortgagors to mortgagees is really a case of sale to a stranger. There is no fiduciary relation between them.

See *Mir Eusuff Ali Haji* v. *Panchanam Chatterjee* [2] *per Justice Mukerjee* as to private sale to the mortgagee. It was held that there is no difference between a court sale and a private sale. *Bisheswar Dial* v. *Ram Sarup* [3] is consistent with all the cases.

The Court expressed the following

Opinion :—We agree with the decision of the Full Bench of the Allahabad High Court in *Bisheshur Dial* v. *Ram Sarup* [3] which was in accordance with the earlier Bombay decision in *Lakshmidas* v. *Jamnadas Shankar Lal* [4] and has been followed in Calcutta in *Mir Easuf Ali Haji* v. *Punchanan Chetterjee* [2]. We have not been referred to any English authority in support of the opposite view. On the other hand, as pointed out in the last mentioned case, Lord Cottenham in *Knight* v. *Marjoribanks* [5] cited with approval the statement in Sugden's Vendors and purchasers, Vol. 3 page 227, 10th edition "that a sale by a mortgagor to a mortgagee stands on the same principle as a sale between parties having no connection with each other, and can only be impeached on the ground of fraud," and added "that inadequacy of price would not be a sufficient ground to impeach such a sale." The dicisions that a mortgagee by purchasing a part of the mortgaged property extinguished the mortgage debt which were overruled in *Nand Kishore* v. *Raja Hariraj Singh* [5] and the further decisions that such a mortgagee-purchaser must credit the difference between the purchase price and the real value of the property purchased in discharge of the mortgage debt, which were overruled in *Bisheshur Dial* v. *Ram Sarup* [3] appear to be quite irreconcilable with the above statement. In this Court we have been referred to the decision of

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[1] 2 Mac. and G.p. 10. [2] (1910) 6 I. C. p. 842 =11 Cal. L. J. 639.
[3] (1900) I. L. R. 22 All. 284. [4] (1896) I. L. R. 22 Bom 304.
[5] (1897) I. L. R. 20 All. 23.

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the Privy Council in *Dulichand* v. *Ramkishen Singh*[1] which is discussed in the order of reference. The judgment no doubt contains passages which may be read as meaning that the mortgage was discharged because the value of the property purchased by the mortgagee after deducting the purchase price exceeded the mortgage debt, but there is no discussion of the principle involved, and in the absence of the judgment of the lower Court and of any report of the argument it is not easy to say what was intended. If it had been a ruling after contest, it would have been dealt with in the head notes to the reports of the case. On the other hand in the earlier case in *Nawab Azmut Ali Khan* v. *Jawahir Singh*,[2] the rule that the part of the mortgaged property purchased by the mortgagee was only chargeable with a proportionate part of the mortgage debt was treated as plainly applicable. That is the rule embodied in S. 82 of of the Transfer of Property Act by which we are governed. If the legislature had intended to make an exception in the case of mortgagee-purchasers, it would no doubt have done so in express terms, as in the case of the special restrictions imposed upon them by the now repealed S. 99. Not only is there no provision to that effect, but the case of a mortgagee acquiring a share of the equity of redemption is expressly dealt with in the last clause of S. 60 which recognises the mortgagor's right to redeem his own share in such a case upon payment of a proportionate amount of the mortgage debt, leaving the balance to be borne by the mortgagee-purchaser, thus applying to this case the general rule provided in S. 82. We answer the question in the negative and overrule *Sami Rowappa* v. *Kuppusami Iyengar*[3].

C. A. S.

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[1] (1881) I. L. R. 7 Cal. 648=8 I. A. 93.

[2] 13 M I. A. 404.

[3] (1911) 2 M. W. N. 423.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE AYLING.

M. P. M. R. M. N. Ramanathan Chettiar... *Appellant.** *(Plaintiff).*

v.

K. R. S. V. Muthiah Chetty and others ... *Respondent (Defendants and legal representatives of the 2nd defendant.)*

Ramanathan Chettiar *v.* Muthiah Chetty.

Right of suit—Minor—Agent appointed by guardian—Suit by minor for account against agent—Suit for handing over particular account—Maintainability—Settlement by arbitrators or mediators—Re-opening of—Grounds.

An agent appointed by the guardian of a minor is not liable to account to the minor for his acts as an agent. It would be unsafe to extend the rule laid down in *Barnes* v. *Addy*[1], and similar cases) with respect to trustees *de son tort* to the persons in the position of agents of the guardian of a minor. It is doubtful if the minor can ask the agent appointed by his guardian to hand over any account.

A settlement made by arbitrators or mediators is not liable to be re-opened except on the ground of fraud.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Sivaganga in Ordinary Suit No. 98 of 1914.

The Honourable The Advocate-General and *T. V. Muthukrishna Iyer*, for the Appellant.

K. V. Krishnaswami Iyer and *C. A. Seshagiri Sastri*, for Respondents.

The Court delivered the following

Abdur Rahim, J.

Judgments :—*Abdur Rahim, J.* :—There were two brothers belonging to the Nattukottai Chetty community, namely, Narayana Chettiar and Muthiah Chettiar. The plaintiff is the son of the former and defendants Nos. 4 to 6 are sons of the latter. The two brothers carried on money-lending business in the name of M. P. M. R. M. They had business in various places. Narayana Chettiar died fifteen years ago, and Muthiah Chettiar died about 10 years previous to the suit. At the time of the latter's death, plaintiff and defendants Nos. 4 to 6 were all minors and the family was undivided. The 1st defendant in the suit is maternal uncle of defendants Nos. 4 to 6. He was appointed as agent by the mother of these defendants to manage and look after their share in the family property and the business. The 2nd defendant who is the maternal uncle of the plaintiff was similarly appointed by the plaintiff's mother. The suit was instituted by the plaintiff who attained majority in 1911 for a decree directing defendants Nos. 1 and 2 to render an account to him of their management of the affairs of the family of the plaintiff and the defendants during his minority and for other reliefs.

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* Appeal No. 97 of 1917. 3rd December, 1919.

[1] (1873) L. R. 9 Ch. App. 244.

The first question that arises is whether the suit is maintainable. It is to be noted that the mothers of plaintiff and defendants Nos. 4 to 6 who appointed defendants Nos. 1 and 2 as agents have not been made parties. It is contended by the learned Advocate-General on behalf of the appellant (plaintiff) that defendants Nos. 1 and 2 must be treated as trustees *de son tort* and as such liable to account to the plaintiff. His argument is that the guardians of the plaintiff and defendants Nos. 4 to 6 occupied the position of trustees and defendants Nos. 1 and 2 having intermeddled with the estate of the minor and having received the properties of the minor are liable to account to him. He has cited a number of rulings, but it is sufficient to point out that all those rulings relate to the liability either of trustees or of persons accountable as trustees for intermeddling or for being connected with breaches of trust of the trust property. The leading authority on the point is the case of *Barnes* v. *Addy* [1]. The other cases cited by the Advocate-General, *Mara* v. *Brown* [2] and *In re Barney & Barney* v. *Barney* [3], simply follow the principle laid down in that case at p. 251. There Lord Selborne states the principle in these words : "Those who create a trust clothe the trustee with a legal power and control over the trust property, imposing on him a corresponding responsibility. That responsibility may no doubt be extended in equity to others who are not properly trustees, if they are found either making themselves trustees *de son tort,* or actually participating in any fraudulent conduct of the trustee to the

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1. (1873) L. R. 9 Chancery Appeals 244. 2. (1896) 1 Ch. 199.
3. (1892) 2 Ch. 265.

injury of the *cestui que trust.* But on the other hand, strangers are not to be made constructive trustees merely because they act as the agents of the trustees in transactions within their legal powers. transactions, perhaps of which a court of equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees. Those are the principles, as it seems to me, which he must bear in mind in dealing with the facts of this case. * * * * *
But on the other hand, if persons dealing honestly as agents are at liberty to rely on the legal power of the trustees, and are not to have the character of trustees constructively imposed upon them, then the transactions of mankind can safely be carried through : and I apprehend those who create trusts do expressly intend, in the absence of fraud and dishonesty, to exonerate such agents of all classes from the responsibilities which are expressly incumbent, by reason of the fiduciary relation, upon the trustees." And Lord Justice James added " I have long thought, and more than once expressed my opinion from this seat, that this court has in some cases gone to the very verge of justice in making good to *cestuis que trust* the consequences of the breaches of trust of their trustees at the expense of persons perfectly honest, but who have been, in some more or less degree, injudicious. I do not think it is for the good of *cestui que trust,* or the good of the world, that those cases should be extended." The learned Advocate-General admitted that there is no authority for the proposition that an agent appointed by the guardian of a minor is liable to account to the minor as if he was a trustee *de son tort,* because he received property belonging to the minor. On the other hand there is a ruling of this court which seems to be opposed to such a proposition, *Chidmbaram Chetty* v. *Pichappa Chetty,* [1]. There it was held that an agent appointed by the administrator of an estate as such cannot be proceeded against on such contract of agency by the person entitled to the estate, and it makes no difference that the administrator obtained the grant as the attorney of the mother and guardian of the person entitled.

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[1] (1907) I. L. R. 30 Mad. 243.

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Abdur Rahim, J.

The learned Advocate-General however drew our attention to a passage in the judgment to the effect that no claim was made against the defendant on the ground of his possession of property belonging to the plaintiff, and he argued that where such an agent is in possession of the property, the law makes a difference. But we do not think that in the absence of any clear authority, it would be safe to hold that an agent appointed by the guardian of the minor is liable to account to the minor for his acts as an agent on the principle applicable to trustees or persons intermeddling with the trust estate. If there were any force in the contention of the appellant, one might reasonably expect that there would have been some authority forthcoming in support of it. It would be unsafe to extend the rule laid down with respect to trustees *de son tort* to the persons in the position of agents of the guardian of the minor. Under the ordinary law an agent is liable to the principal. The state of accounts between an agent and a principal and the liabilities of the agent to the principal would be on a very different footing from the account which a trustee or a person intermeddling with the trust estate has to render to the *cestui que trust.* Besides, as mentioned above, in this case the mothers who appointed defendants Nos. 1 and 2 as agents have not been made parties, and any decree in this case would not exempt the agents from their liability to their principals. The conclusion of the learned Subordinate Judge on this point is right.

The 2nd point relates to a sum of Rs. 14,000 and odd which the plaintiff paid to the 1st defendant on behalf of defendants Nos. 4 to 6. The Subordinate Judge has found that this was settled by arbitration and the question cannot be re-opened. On the other hand the case of the plaintiff is that it is a matter of stated and settled accounts and if he is able to show errors in the account, he is entitled to re-open the question. Exhibit III makes it clear that the settlement was made by arbitrators or mediators. Such a settlement is not liable to be re-opened, except on the ground of fraud which is not alleged in this case.

The third point arises under the 2nd issue. Plaintiff claims to recover from the 1st defendant a certain book of account

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—
Abdur Rahim, J.,

called Oorkanakku. The Subordinate Judge upon the evidence found that the 1st defendant was not in possession of the account. Besides that, it is doubtful, if the plaintiff is not entitled to ask the 1st defendant to render an account to him that he can ask him to hand over any account.

The appeal fails on all the points and must be dismissed with costs.

Ayling, J.,

Ayling, J.:—I agree.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE MOORE.

Chekkur Puthalath Poothak Etathil Kunhi Sankaran Nambiar ... *Appellant* (2nd Defendant.)*

v.

Ponniath Akathoothu Narain Thirumumpu and others ... *Respondents (Plaintiff and defendants Nos. 1, 3 and 4.)*

Kunhi Sankaran Nambiar v. Ponniath Akathoothu Narain Thirumumpu.

Mortgage deed—Execution—Attestation—Registration—Validity—Original valid execution and attestation with regard to one item of property—Subsequent interpolation by mortgagor in the presence of attesting witnesses so as to include second item—Validity of mortgage—Interpolation with assent and to suit convenience of both parties—Effect.

In a suit on a mortgage-deed, executed by the 1st defendant to the third and assigned by the latter to the plaintiff, it appeared that the first item of the plaint property was the only property originally intended to be mortgaged, that the deed was engrossed and signed by the 1st defendant and attested by two witnesses with that intention; that, subsequently to serve the convenience of both the parties to the transaction and to avoid delay in registering the deed the 1st defendant made, in the presence of the attesting witnesses, an interpolation in the body of the deed so as to include the second item of property also, and that he subsequently presented the altered deed for registration and had it registered. On objection raised by the 1st defendant that the deed was invalid for want of proper execution proper attestation, and proper registration,

Held, (1) that the deed did not offend against the rule enunciated in *Harendra Lal Roy Choudhuri* v. *Hari Das Debi* [1], if it was otherwise valid;

(2) that by the fact of himself inserting the interpolation and presenting the altered document for registration, the 1st defendant must be deemed to have executed the document not only with reference to the 1st item but also with reference to the second item;

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* S. A. No. 2018 of 1918. (19th November, 1919.)

[1] (1914) I. L. R. 41 C. 972 P. C.,

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(3) that the attesting witnesses must be deemed to have agreed to regard their attestation as applicable not only to the 1st item of property but also to the second item.

Where a party who has no disposing power over a property includes it in a deed for the purpose of getting it registered within a particular jurisdiction.

Semble. there would be fraud upon the Registration Law within the language of the Privy Council in *Harendra Lal Roy Choudhuri* v. *Hari Das Debi* [1].

Second Appeal against the decree of the Court of the Additional Temporary Subordinate Judge of North Malabar in A. S. No. 185 of 1918 (A. S. No. 287 of 1917, District Court) preferred against the decree of the Court of the District Munsif of Kuthuparamba in O. S. No. 303 of 1916.

C. Madhavan Nair, for Appellant.

P. M. Menon and *B. Pocker*, for Respondent.

The Court delivered the following

Judgment :—This is a suit on a mortgage. The first defendant, the owner of the property executed Exhibit A to the third defendant in 1908. The third defendant assigned it to the plaintiff. The defence is that the mortgage is invalid for want of proper execution, proper attestation and proper registration.

The first item of the plaint property was the only property originally intended to be mortgaged. The deed was engrossed and signed by the first defendant and attested by two witnesses with this intention. Subsequently the second item of property was included. The finding is that this was done with the consent and knowledge of the mortgagor and in the presence of the attesting witnesses.

The lower Courts have expressed themselves somewhat loosely in giving findings upon this part of the case. Both the Courts are agreed that there was no fraud either against the registration laws or against any of the parties to the contract, in making this interpolation. It is also clear from what both the lower Courts say that the object of adding the second item was not so much to give an additional security to the mortgagee as it was to enable the mortgagor to get the document registered near the place where he was living. The evidence makes it clear that it was to serve the convenience of both the parties to the transaction that this item was included, because the aim was

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[1] (1914) 41 I. L. R. C. 972.

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to be taken as laying to avoid delay in registering the deed. On these facts, we feel no hesitation in holding that the deed does not offend the rule enunciated in *Harendra Lal Roy Chowdhuri* v. *Hari Das Debi* [1] if it is otherwise valid. The object of the interpolation was not to effect a fraud upon the registration law. Whatever might have been the original intention of the parties, they deliberately included the second item in the mortgage.

The contentions raised by Mr. Madhavan Nair were these. The document was not executed by the mortgagor with reference to the second item. It was not attested by the witnesses with respect to this item. Therefore, although the document might be valid so far as the execution and attesation of the first item of property are concerned, as the document could not have been validly registered if the second item had not been included, the whole document is inoperative.

There is no authority directly bearing on this question. There is a decision in *David Yule* v. *Ram Khelawan Sahai* [2] which, on the face of it, supports the respondent. In that case a document was signed by the executant before the body of the document was written up. The learned judges held that it was not open to the executant to dispute its validity. As Mr. Madhavan Nair pointed out, it was an *obiter dictum* ; and we doubt very much, whether this decision is right.

In *Burgis* v. *Constantine* [3], it was held that where a material part of the document was left blank the document should not be regarded as valid. The principle is thus summarised in in 10 Halsbury para 687. " A deed must be written before it is sealed. If, therefore, a man seal and deliver a writing which is left blank in some material part, that is void for uncertainty and is not his deed, and it cannot be made his deed merely by filling up the blanks after his execution of it." Therefore we are not prepared to rest our decision upon the *obiter dictum* contained in *David Yule* v. *Ram Khelawan Sahai* [2]. But it seems to us that the present case comes within the principle of *Hall* v. *Handless* [4]. There were blanks in that case which were subsequently filled up and some of the interpolations were of material character. In that case it was held that, where, after the execution of the deed by some of the parties, the deed was

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[1] (1914) I. L. R. 41 Cal. 972.

[2] (1901) 6 C. W. N. 329.

[3] (1908) 2 K. B. 484,

[4] (1827) 4 Bingham 128.

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altered with the consent and privity of the promisee, the document is not vitiated. The alteration in that case was the deleting of the property which was included by mistake. Such an omission was held not to affect the validity of the deed. In *Doe dem Lewis* v. *Bingham* [1] where there were material alterations by filling up the blanks left in the body of the document after it was executed, the learned Judges held, that the documeut was enforceable. Bayley J. said "I am of opinion that any alteration made *in the progress of the Transaction* (the italics are ours) still leaves the deed valid as to the parties previously executing it, provided such alteration has not affected the situation in which they stood." Abbott C. J. Holroyd J. and Best J. agreed with this view. In the language of Bayley J. it can be said of the present case that the alteration was made in the progress of the transaction, to give validity to the document which had not yet been registered ; before the document was taken to registration, with the consent of all the parties this interpolation was made. Applying the principle in *Doe dem Lewis* v. *Bingham* [1] we are of opinion that the interpolation does not affect the validity of the document.

In *Tupper* v. *Foulkes* [2] the defendant had authorised his son to execute the document. After its execution he accepted it as his own. Subsequently in an action on the bond, he pleaded *non est factum.* Earle C. J. held, "I am clearly of opinion that the admission of the defendant is always evidence to prove anything that he intended to admit." William J. and Keating J. agreed with the Chief Justice. Keating J. expressed himself very strongly on the point. He said, "First, there was an admission by the defendant that he had given authority to his son to execute the deed in his name.* * * The deed being present and seen by the defendant, he deliberately adopts the act of his son. But the evidence does not stop there. It was proved that the defendant afterwards took an active part in directing the proceedings under this very deed. It was clear from his statements and his acts that he intended to acknowledge the deed as his deed. That amounts to a delivery in law, and is evidence upon *non est factum.*"

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[1] (1821) 4 B. and Ald. 672=106 E. R 1082.

[2] (1861) 9 C. B. N. S. 797=142 E. R. 314 at 319.

In the present case, it is in evidence that the defendant himself inserted in the body of the deed the words which he complains to have vitiated it. He subsequently had it registered. This is therefore an a *foritori* case.

We may also refer to the case of *Adsetts* v. *Hives* [1]. No doubt there it was held that an immaterial alteration which was intended to supply formal defects did not vitiate the deed. We cite this case because Sir John Romilly refers with approval to *Doe dem Lewis* v. *Bingham* [2].

On the authority of the above cases, we are of opinion that by the fact of himself inserting the interpolation and presenting the altered document for registration, the defendant must be deemed to have executed the document not only with reference to the first item but also with reference to the second item.

The second question is whether it can be said that there was proper attestation in respect of the document as altered. The interpolation is found to have been made in the presence of the attesting witnesses. Reliance was placed by Mr. Madhavan Nair upon *Shamu Pattar* v. *Abdul Kadir Rowthen* [3] for the proposition that unless the attesting witnesses see to execution by the party, there can be no valid attestation. The difficulty felt in *Shamu Pattar* v. *Abdul Kadir Rowthen* [3] does not arise in this case. The attesting witnesses were present when the mortgagor put his signature to the document and they were also present when the mortgagor made the interpolation. They must therefore be deemed to have agreed to regard their attestation as applicable not only to the first item of the property comprised in the document but also to the second item as well. This is not a case where the attestors did not see the signature of the executant, but only relied on his acknowledgment. The only other authority which need be referred to is *Muniappa Chettiar* v. *Vellachami Mannadi* [4]. In that case two persons intended to execute a document. One alone executed it and then the attestor attested. Then the document was taken to the second executant who signed it. It was held that the attestation would not cover the execution by the second party. This conclusion follows directly from

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[1] (1863) 33 Beaven 52,=55 E. R. 286.

[2] (1821) 4 B. and Ald. 672.

[3] (1912) I. L. R. 35 Mad. 607.

[4] (1918) M. W. N. 853.

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Shamu Pattar v. *Abdul Kadir Rowthen* [1]. The attestors did not see the second executant sign the document and therefore, so far as that party, was concerned, there was no valid attestation.

We may briefly notice the last argument addressed by the learned counsel for the appellant regarding registration. There are two decisions, one of the Allahabad High Court in *Pahladi Lal* v. *Mussammai Laraiti* [2] and the other of the Patna High Court in *Ramdei* v. *Chunderballi Bibi* [3], cited by Mr. Menon in support of his contention. In both the cases where property over which the mortgagor had no power of disposition was included with a view to facilitate registration in a particular sub-district, it was held that there was no fraud upon the Registration Law and that *Harendra Lal Roy Choudhri* v. *Hari Das Debi*, [4] did not apply.

If we did not hold that there was valid execution and attestation, we would have felt considerable doubts on this part of the case. Where a party who has no disposing power over a property includes it for the purpose of getting the document registered within a particular jurisdiction, as at present advised, we are not satisfied that there would not be a fraud upon the registration law within the language of the Judicial Committee in *Harendra Lal Roy Choudhri* v. *Hari Das Debi* [4], but, as we have held that there was valid execution and attestation, we need not pursue this question any further. In our opinion, the decision of the Courts below is right and this second appeal must be dismissed with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER AND MR. JUSTICE KRISHNAN.

Kandregula Anantha Rao Pantulu ... *Appellant*[*] (*Petitioner*.)

v.

Kandikenda Surayya and another ... *Respondent* (*Defendants Nos. 1 to 3*).

Anantha Rao Pantulu v. Kandikenda Surayya.

Contract Act, Ss. 64, 65 and 73—Contract—Material alteration by plaintiff—Claim for damages for non-performance of contract by defendant—Right to refund of moneys advanced.

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[*] S. A. No. 210 of 1919. 9th December, 1919.

[1] (1912) I. L. R. 35 Mad. 607.

[2] (1918) I. L. R. 41 All. 22.

[3] (1918) 44 I. C. 399.

[4] (1914) I. L. R. 41 Cal. 972.

Anantha Rao Pantulu v. Kandikenda Surayya.

Where a party to a written contract has materially altered its terms without the knowledge and consent of the other party, the former cannot enforce the contract or claim damages for its non-performance by the latter. The plaintiff however is entitled to a refund of the moneys actually advanced by him under the contract to the defendant who has broken the same.

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge of Rajahmundry in A. S. No. 27 of 1918 (A. S. No. 63 of 1918 of the District Court of Godavari at Rajahmundry) preferred against the decree of the Court of the Additional District Munsif of Rajahmundry in O. S. No. 477 of 1916.

P. Narayanamurthi, for the Appetlant.

N. Rama Rao, for the Respondent.

The Court delivered the following

Spencer, J.

Judgments:—*Spencer, J.*—I cannot agree with the learned Subordinate Judge in his view that the plaintiff is debarred from recovering the advance made by him for the mere reason that Ex. A. (the contract deed) and Ex. A. (1) in which the receipt of the advance was acknowledged were written on the same piece of paper and that a material alteration of one would affect the other with the taint of fraud.

In my opinion the defendant is bound to refund any advance taken by him whether the contract is void or voidable and rescinded. In one case S. 65 of the Contract Act applies, in the other S. 64.

There is no question now of performing the contract. 1st Defendant does not want to perform it and he may be treated as having rescinded it as he set up in his written statement another arrangement by which the original contract had been superseded. In fact the 1st defendant in his written statement, paragraph 10, did not deny his liability to refund the advance of Rs. 1,200, but he alleged that satisfaction had been given as regards Rs. 500 and that only Rs. 700 remained to be paid.

As for the claim for damages for non-performance of the contract on the point of law which is whether a plaintiff who has made a material alteration in an instrument containing a contract can recover any amount under it, I think we should follow *Chitturi Suriah* v. *Boddu Ramayya* [1] *Gour Chandra Das* v. *Prasanna Kumar Chandra* [2] and the case of *Powell* v. *Divett* [3].

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[1] (1915) M. W. N. 150.

[2] (1906) I. L. R. 33 Cal. 812.

[3] (1812) 104 Eng. Rep. 755.

Anantha Rao Pantulu v. Kandikenda Surayya.

Spencer, J.

In fact Mr. Narayanamurthi conceded after some argument that as the terms of the contract were embodied in Exhibit A. he was not entitled to recover damages independently of this document.

The only question then left was as to the appellant's (plaintiff's) right to recover the advance of Rs. 1,200 and this must be found for the appellant on the strength of 1st defendant's admission and the reasons given above.

The result will be that the appeal will be allowed with proportionate costs in this and the Lower Appellate Court on this part of the plaintiff's claim and the decree of the District Munsiff will be restored against 1st respondent and the second appeal dismissed with costs against 2nd respondent, who, it is conceded has been unnecessarily made a party to this appeal.

Krishnan, J.

Krishnan J. :—I accept the finding of the lower Court that the written contract Exhibit A has been materially altered by the plaintiff without the knowledge and consent of the 1st defendant, the other party to it. On that finding we must hold that plaintiff is not entitled to enforce that contract, see *Powell* v. *Divett* [1], and that his suit so far as it is for damages was rightly dismissed as it would be enforcing the contract to give him such damages.

It is however argued that plaintiff, is nevertheless entitled to the repayment of the Rs. 1,200 paid by him as an advance for the 1st defendant and the claim is made under S. 64 or 65 of the contract Act. The view of the lower appellate court that Ex. A. (1) the receipt given for the money is also rendered invalid by the alteration in Ex. A. does not seem to me to be supportable. It is only a receipt for the money paid. If the repayment of that money is claimed by way of enforcement of the contract no doubt plaintiff will be met by the objection based on its material alteration. But it is not so claimed. The lower Courts have found that the 1st defendant did not perform the contract but on the other hand he committed breach of it. Though plaintiff cannot take advantage of the breach to claim damages, he is not precluded from relying upon it and treating the contract as having become void under S. 65 and requiring the deft. to repay the money advanced to him. Illustration (c) of S. 65 seems to indicate that the section is meant to apply also to cases where one party breaks a contract and the other party in consequence of it rescinds it. The material alteration though it prevents plaintiff from enforcing the contract does not seem to prevent him from rescinding it. No authority has been cited to show that it does. On the other hand the ruling in *Chitturi Suriah* v. *Boddu Ramayya* [1] would seem to support the view that the money advanced could be claimed back. Plaintiff would therefore be entitled to be paid back the Rs. 1,200 that he paid.

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[1] (1812) 104 Eng. Rep. 755,

The second appeal so far as it is against the 2nd respondent is not pressed. I would therefore allow the second Appeal against the 1st Respondent and reversing the decree of the Subordinate Judge, restore that of the Dt. Munsif. Plaintiff, will pay and receive proportionate costs so far as the 1st Respondent is concerned in this and the lower Appellate Court.

The Second Appeal is dismissed with costs against the 2nd Respondent.

A. V. V.

PRIVY COUNCIL.

PRESENT :—VISCOUNT HALDANE, LORD BUCKMASTER, AND LORD DUNEDIN.

Chaudhri Satgur Prasad ... *Appellant* *

v.

Kishore Lal and others ... *Respondents.*

Limitation—Adverse possession—Assertions of ownership by possessor, their effect—Indian Limitation Act (Act XV of 1877) Sched. II Art. 144.

The question whether possession is adverse or permissive may often be one of legal inference from documents, concurrent findings on which of the lower courts will not be binding on the Privy Council.

In the present appeal the Board held that the possesion of a certain Hindu widow was adverse to the reversioners, although the lower courts had concurrently found that she was in possession only in lieu of maintenance.

Appeal from a decree of the Allahabad High Court, dated July 13th 1911, affirming a decree of the Subordinate Judge of Gorakhpur.

This suit was brought by the reversioners of two Hindu brothers to recover from the defendants certain property formerly held by

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* P. C. Appeal No. 64 of 1917. May 23rd, 26th and 27th 1919.

[1] [1915] M. W. N. 150.

P. C.

Chaudhri Satgur Prasad v. Kishore Lal.

Dilla Kunwari, a widow of the surviving brother. Dilla Kunwari's husband died in 1851; in 1861, on the death of her husband's surviving brother, she obtained possession of a moiety of her husband's property: she died in 1895.

The only substantial question in the case was whether her possession was adverse to that of the reversioners or whether, as contended by the plaintiffs, she had been all along allowed to remain in possession in lieu of maintenance. The High Court (Sir H. Richards, C. J., and P. C. Banerji, J.,) affirming the Subordinate Judge of Gorakhpur, adopted the second view, and refused leave to appeal on the ground that the question was purely one of fact.

The Board granted special leave to Appeal.

Sir W. Garth, for Appellant.

De Gruyther, *K. C.* and *Dr. Abdul Majid*, for Respondents.

Sir W. Garth for appellant; The plaintiff's claim is long since barred by limitation. The High Court have erred in holding that Dilla Kunwari held in lieu of maintenance and by permission: it is clear from the evidence and especially from the documents that throughout she set up her own title. When a Hindu widow openly asserts, as here, an absolute title, a suit by the reversioners of her husband is barred after the statutory period of 12 years: *Lachan Kunwari* v. *Anant Singh* [1]. *Sham Koer* v. *Dah Koer* [2]. *De Gruyther K. C.*, for respondents. The question whether Dilla Kunwari's possession was adverse or permissive is one of fact and is no longer open; we have concurrent findings in our favour. The possession of Dilla not being adverse, time did not run against the reversioners till her death in 1895: *Srinath Gangopadhya* v. *Mohes Chandra Roy* [3].

Sir W. Garth replied: The question is not really one of fact, it is a question of the construction of documents and the proper inferences to be drawn from those documents and from the admitted facts; it is essentially a question of law. The High Court came to a wrong conclusion, and the Board are not bound by their decision.

Their Lordship's judgment was delivered (June 26th 1919) by

Viscount Haldane.

Viscount Haldane.—This is an appeal from a judgment of the High Court of Allahabad, affirming the conclusion come to by the Subordinate Judge of Gorakhpur. The only question of substance is when time began to run under the Indian Limitation Act against a claim to recover possession made by the first

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1. (1894) L. R. 22 I. A. 25.
2. (1902) 29 I. A. 132.
3. (1869) 14 Ben. L. R. (F. B.) 3.

respondent. The property in dispute was held by a Hindu lady called Dilla Kunwari. She died in 1895, and the controversy turns on whether her possession was that of one claiming adversely as against any other title, or whether, as the Courts below have held, that possession was not adverse but under licence from or by permission of the predecessors-in-title of the first respondent, a licence or permission granted during the lady's life-time, in order to afford her the maintenance which she claimed as a widow. In that case time did not begin to run against his claim until she died in 1895, and the Limitation Act has not operated so as to defeat this action.

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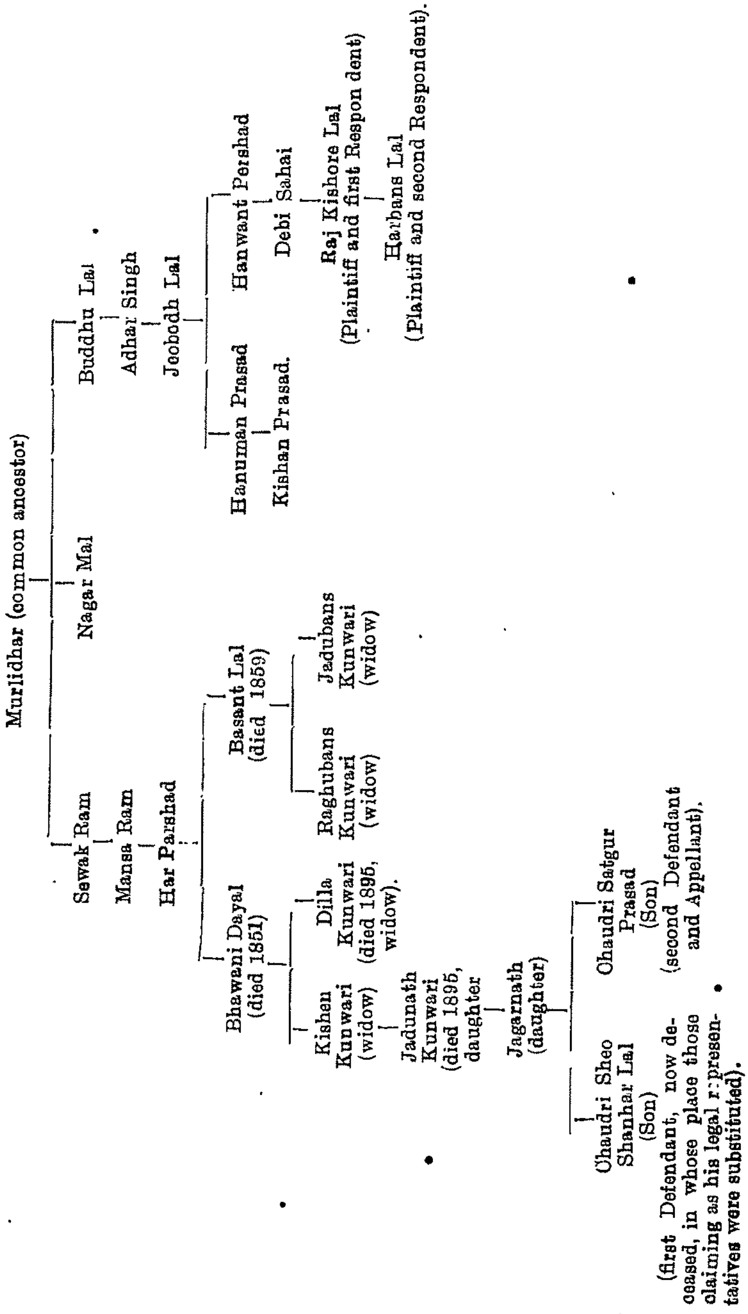
Chaudhri Satgur Prasad *v.* Kishore Lal.

Viscount Haldane.

It will be convenient, in order to make the situation of the parties intelligible, to set out the pedigree in a table :—


Murlidhar (common ancestor)
Sewak Ram
Nagar Mal
Buddhu Lal
Mansa Ram
Adhar Singh
Har Parshad
Jeobodh Lal
Bhawani Dayal (died 1851)
Basant Lal (died 1859)
Hanuman Prasad
Hanwant Pershad
Kishan Prasad.
Debi Sahai
Kishen Kunwari (widow)
Dilla Kunwari (died 1895, widow).
Raghubans Kunwari (widow)
Jadubans Kunwari (widow)
Raj Kishore Lal (Plaintiff and first Respon dent)
Harbans Lal (Plaintiff and second Respondent).
Jadunath Kunwari (died 1895, daughter
Jagarnath (daughter)
Chaudri Sheo Shankar Lal (Son) (first Defendant, now deceased, in whose place those claiming as his legal representatives were substituted).
Chaudri Satgur Prasad (Son) (second Defendant and Appellant).

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Chaudhri Satgur Prasad v. Kishore Lal

Viscount Haldane.

It is not now in dispute that Bhawani and Basant, who appear in the pedigree, were at the time of the death of the former in 1851 joint, and that Basant became entitled to the entire family property, subject to such rights as Kishen and Dilla, Bhawani's widows, possessed. When Basant died in 1859, his widows, Raghubans and Jadubans, had similar rights, and subject to these, his sapindas, the male cousins and his reversioners, Hanuman and Hanwant, took the property. In 1861 Raghubans and Jadubans, the widows of Basant, both died, and it is of importance to see what happened then. The learned Subordinate Judge held that the two widows of Bhawani got possession of the estate in equal moieties. As will appear, the controversy is confined to the share held by Dilla, for as to the other half taken possession of by the other widow, Kishen, an independent title, under a deed of gift, as to which title there is no dispute in this appeal, became vested in her daughter, Jadunath, and was transmitted to the defendants. Jadunath took possession of this half in 1879 under the deed of gift. It is immaterial whether the deed was valid or not, so far as concerns what she took possession of in that year, for any claim of the respondent plaintiff against her has, as is not in dispute, become barred by limitation. The only question is as to what was held by her aunt, Dilla.

The period prescribed by the Indian Limitation Act, 1877, S. 144 of Schedule 2, as that within which a suit for possession has to be brought, is twelve years from the time when the possession of the defendant became adverse to the plaintiff. It is therefore obvious that if the possession of Dilla, after Basant's death, was really adverse, the respondents' claim fails. It is important to see what was the position of the lady after the death of her husband, Bhawani, in 1851. In November of that year, she and the other widow, Kishen, entered into a written agreement with Bhawani's brother, Basant, the terms of which were that the name of Basant as inheriting should be entered in the Government register in place of that of Bhawani, and that he should "pay the Government revenue, manage the *ilaka* (or property), and make collections and give expenses and clothes (and money) when required for charitable purposes," to Kishen and Dilla, that the messing should continue to be joint, and that both widows should exercise control over the servants and *ilaka* as heretofore. Their Lordships are of opinion that if this were all, it left the possession as a provisional arrangement undisturded in Basant. All that the ladies were to do was to live as before on the property and be maintained there, without any occupation of an exclusive or adverse kind. But did the non-exclusive character of this occupation change after Basant's death in 1859? The answer to this question turns on what Bhawani's widows, Kishen and Dilla, did in the way of publicly asserting a claim to exclusive possession and ownership. The learned Subordinate Judge thought that it had been proved, as regards the share of Dilla, that in controversy in this suit, by (1) her statements and the manner in which she entered into possession; (2) the admissions of the defendants; and (3) certain earlier judgments of the High Court in other suits, that Dilla was in possession only in lieu of her maintenance for life, and not in adverse possession. The High Court expressed the same view, but without giving detailed reasons for it.

It is with reluctance that their Lordships differ from the concurrent opinions of the two courts below on this point; but it is one in reality of legal inference from documents and not of finding of fact, and their Lordships are unable to draw the inferences made by the Subordinate Judge and followed by the High Court. To begin with, the so-called "compromise" with Basant was not a compromise at all. It was a mere arrangement that, according to the alleged family custom, his name should be entered in place of that of his deceased brother, Bhawani, so that he might pay the Government revenue and manage the estate, the ladies messing jointly with him and controlling the servants and the property. Such an arrangement was probably a convenient one under the circumstances, as is further explained in an application of the ladies to the Tahsildar, dated the 8th December, 1851, on the ground that the step was customary when ladies were *pardanashin*, and, as the document says, was an arrangement designed to obviate disputes. But it does not appear to settle any questions of title, or to show, as the learned Judge thought, that Basant was made the owner to the exclusion of the ladies from every title excepting one to maintenance. It renders natural the subsequent conduct of Dilla in what appears to their Lordships to have been a succession of assertions of ownership after Basant's death. Even from the written statement of the 19th June, 1867, relied on by the learned Subordinate Judge as showing that Dilla claimed possession in mere enforcement of a right to maintenance, it is clear that she claimed much more; for she asserts that she was the "patni" or wedded wife of Bhawani, and as such entitled as full heir to a share of the separate property which she alleges was what he possessed. In another written statement, which she put in in a suit brought against her by Jadunath in 1870, she asserts that she and Kishen were their husband's heirs, and had all along been in possession as such. It is only as an alternative plea that in this document she sets up a title to possess on the footing of a right to maintenance. The application of Dilla, dated the 6th September, 1861, made for a record of title after the deaths of Basant's two widows, contains an assertion, thus publicly made, that she and Kishen had become by these deaths the heirs and the only heirs to the property. It appears that mutation into Dilla's name duly followed on this application. Again in 1880 Dilla made an absolute gift for religious purposes of a part of the property. Their Lordships think that it is impossible in the face of these open assertions of full title, to draw the inference that Dilla claimed no more than such a possession as would yield her maintenance during her life; nor does it appear to them that certain admissions suggested as having been made by the defendants in the various proceedings referred to by the learned Judge who tried the case are such as to preclude them from setting up the real nature of Dilla's possession. Further, they do not think that anything decided in the previous suits referred to by the Subordinate Judge, to which neither the respondents nor any person through whom they claim were parties, precludes the appellant from now setting up in the present suit that Dilla's possession was adverse as against the respondents.

If the true inference be that the lady was in possession and asserting a title to full ownership of her share, at all events from the death of Basant in 1859 down to her own death in 1895, it is clear that the title of the plaintiffs was barred by limitation.

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Chaudhri Satgur Prasad, v. Kishore Lal.

Viscount Haldane.

This makes it unnecessary to consider the other questions raised in the suit. There is a concurrent finding as to the age of the first plaintiff, Raj Kishore, according to which he was born before a deed of gift, dated the 8th September, 1866, by which Hanuman Parshad and Debi Sahai purported to transfer the whole estate to Jadunath. This finding, which is binding on their Lordships, disposes of a defence which might otherwise have been open to the defendants, for it shows that the deed of gift, which was of ancestral property, was wholly void. The plaintiffs were therefore neither hampered by this deed nor affected by admissions based on it.

But for the reasons given earlier their Lordships are of opinion that they must humbly advise His Majesty that this appeal should be allowed, and that a decree should be made in favour of the appellant dismissing the suit. The first and second respondents, who were plaintiffs in the suit, will pay the costs here and in the Courts below.

Solicitor for Appellant :—*Douglas Grant.*

Solicitors for Respondents .—*Ranken Ford* and *Chester.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE MOORE.

Rahim Unnissa Begam and others ... *Appellants** (*Claimants Petitioners* 2 to 5.)

v.

M. A Srinivasa Aiyangar ... *Respondent* (*Plaintiff Respondent*).

Rahim Unnissa Begam v Srinivasa Aiyangar.

Civil Procedure Code O 22 R 9-Abatement of suit—Effect of, on the right of parties —Judgment inter parties when cannot be questioned by a third person.

When a suit has abated and the abatement has not been set aside the defendant is entitled, as long as he continues in possession of the suit property, to plead against the plaintiff and those claiming under him that the order of abatement is conclusive of the rights to the property. In such a case the order of abatement operates as a judgment in favour of the defendant and no distinction can be made between a judgment obtained on the merits and a judgment obtained on a failure to prosecute the suit.

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* A. A. O. No. 97 of 1919. 8th October, 1919.

Rahim Unnissa Begam *v.* Srinivasa Aiyangar.

When a judgment has established the right to any property between two parties, it is not open to a third person to set up the right of that party whose title has been found against as against the successful party. Such cases from an exception to the rule of *res inter alios acta.*

R. brought a suit against her father A and his alienees for recovery of certain properties on the ground that the sale-deed in the name of her father was *benami* for her. Pending the suit R died and an order was made declaring that the suit abated. An application for setting aside the abatement by a creditor was also dismissed. The creditor then obtained a decree against the assets of R in the hands of the defendants and attached the properties which were the subject-matter of the former suit. On a claim petition by A that the properties belonged to him exclusively and that his daughter R had no interest in them, *held* that the claimant was entitled to succeed.

Appeal against the order of the District Judge of Chingleput in Miscellaneous Petition No. 523 of 1915 (In execution petition No. 34 of 1915 and in C. S. No. 43 of 1913).

C. Venkatasubbaramiah, for Appellants.

T. Narasimha Aiyangar and *N. S. Rangaswami Aiyangar,* for Respondents.

The Court delivered the following

Judgment :—The respondent obtained a money decree in O. S. No. 43 of 1913 in the District Court of Chingleput against the assets of a Mahomedan lady named Rahimatunnissa Begum in the hands of the defendants, and in execution attached certain immoveable properties as belonging to the deceased judgment-debtor. Rahimatunnissa Begam's father Abdul Razack put in a claim petition alleging that the property belonged to him exclusively, and that his daughter had no interest in it. Abdul Razack having died the present appellants were brought on record as his legal representatives. The sale deed for the property admittedly stands in the name of Abdul Razack, her father. The District Judge dismissed the claim petition and allowed execution to issue. Hence this appeal. In O. S. No. 12 of 1909, in the District Court of Chingleput the judgment-debtor brought a suit against her father and his alienees for recovery of these properties on the allegation that the sale deed was benami for her and that she was the real owner. She died during the pendency of the suit, and an order was made on the 16th of October 1912 declaring that the suit abated. The present respondent first applied to set aside the abatement on the ground that as a creditor he was entitled to that relief. That was dismissed (Vide Exhibit D.).

Thereupon he obtained letters of administration to his judgment-debtor's estate on the 31st March 1915, and again applied for setting aside the abatement. That also was rejected. The question for decision is whether having regard to the abatement of the suit and to the dismissal of the applications for setting aside the abatement the respondent is precluded from attaching the property as that of the judgment-debtor. We are unable to agree with the appellant's vakil on this question. The capacity in which he seeks to execute his decree is not that of a person who has obtained letters of administration or generally as the legal representative of the judgment-debtor, but in his capacity as decree-holder. We do not think that there is any estoppel against his being permitted to execute the decree.

The more difficult question is whether so long as the abatement stands the decree-holder can treat the property as that of his judgment-debtor. Two questions arise for consideration : (1) what is the effect of an order of abatement and (2) how far does it affect persons who are not the legal representatives of the deceased plaintiff ? On neither of these questions is there any direct authority? But it seems to us that both the questions must be answered against the decreeholder. It has been consistently held in this Court that an order of abatement is appealable as a decree. It was first laid down in *Subbayya* v. *Saminatha Aiyar* [1] and was followed in *Meenatchi Achi* v. *Anantha Narayana Aiyar* [2]. In *Subbu Naicken* v. *Perumal Chetty* [3] all the earlier authorities were reviewed, and it was pointed out that an order of abatement is a judgment and should be followed up by a decree. These decisions are supported by the dictum of the Judicial Committee in *Brij Indar Singh* v. *Kanshi Ram* [4]. Their Lordships say at page 109 : "An order abating the suit looking into the terms of S. 371 already quoted, may be said to be really tantamount to a judgment in favour of the defendant." This observation was made with reference to the Code of Civil Procedure of 1882. O. 22 R. 9 reproduces without any material alteration the language of the old Code. The dictum

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1. (1895) I. L. R. 18 Mad. 496. 2. (1902) I. L. R. 26 Mad. 224.
3. (1916) 30 M. L. J. 486.
4. (1917) I. L. R. 45 Cal. 94=33 M. L. J. 486 (P. C.)

of the Judicial Committee that an order of abatement operates as a judgment in favour of the defendant shows that in effect no distinction is made between a judgment obtained on merits and a judgment obtained on failure to prosecute the suit. So long as the plaintiff is unable to vacate the judgment and so long as the defendant continues in possession he can plead against the plaintiff and those claiming under him that the order of abatement is conclusive of his rights to the property. *Goda Koopooramier* v. *Soondarammal* [1] lays down that the only course open to a legal representative if he wants to escape the effect of the abatement order is to apply for setting aside the abatement and that so long as it stands unreversed it is binding on him. Thus far it is clear that the heirs of the plaintiff who are out of possession are concluded by the abatement order.

Mr. Narasimha Aiyangar for the respondent drew our attention to *Jaysingh* v. *Gopal* [2] wherein the learned Judges held that an order of abatement does not operate as *res judicata.* In that case, the legal representative of the plaintiff on whose death, the suit abated got into possession of the property. It was decided that being in possession he was entitled to resist the suit brought to oust him from possession and that the previous order of abatement did not preclude him from setting up title. Accepting this judgment as rightly laying down the law, it does not affect the present case. In this case the heirs of the deceased defendant in the first suit are still in possession. The learned Vakil for the respondent argued that the possession of the father of the defendant in the first suit, after the death of his debtor which event happened earlier, must be attributed in his right as the heir of his debtor and not to a higher title; he relied upon this Court's decision in *Velayudham Pillai* v. *Subbraya Pillai* [3]. There is no force in this contention. The father had, in the language of the Judicial Committee, obtained a judgment declaring his rights to the property which stood in his name and which right was challenged by the plaintiff. It is impossible to suggest that he either voluntarily or by a fiction of law, gave up this right and substituted for it a right to a share in that property. *Velayudham Pillai* v. *Subraya Pillai* [3] does not lay down any such proposition. Therefore

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[1] (1909) I. L. R. 33 Mad. 167.
[2] 6 Bom. L. R 638.
[3] (1915) I. L. R. 39 Mad. 879.

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the position is this, the decree-holder has to establish against a party in possession and in whose favour an order of Court has been passed that that party is not entitled to retain possession as owner of the property. In other words, the effect of upholding the contention of the respondent will be to give a person who derives title from the alleged owner a larger right of attack against persons in possession than that the owner himself possessed. No authority has been cited for such a proposition. The decision in *Rani Chand Kuar* v. *Partap Singh* [1] in which the Judicial Committee held that a dismissal for default does not operate as *res judicata* has no bearing upon this question.

Now comes the last point whether the respondent who is not claiming title under his deceased judgment-debtor is affected by the order of abatement. We have pointed out already that the legal representatives are barred. Is there any warrant for giving to a stranger a better title than to the alleged owner or her legal representatives? The principle of *res judicata* may not apply to a stranger; but he has to displace what has been described in more than one judgment of this Court, a chain in the title of the defendant. To repeat that attempt the defendant can plead the previous judgment. There are numerous cases in this court which have held that a judgment as a chain of title is an exception to the rule of *res inter alios acta*. *Srinivasa Aiyangar* v. *Arya Srinivasa* [2], *Sayam Ramamurthi* v. *The Secretary of State for India in Council* [3] *Suppa Bhattar* v. *Suppa Sokkayya Bhatter* [4] and *Khaji Syed Yusuf Sahib* v. *Ediga Narasimhappa* [5] all lay down this proposition. We see no reason for not following these decisions.

It was said that the cause of action for the execution is different from the cause of action for the suit brought by the judgment-debtor against her father. We fail to see the difference. The decree-holder is agitating the same right and is challenging the same infringement which formed the basis of the suit in the previous litigation. We must therefore hold that the right and the infringement are the same on both the occasions. For these reasons we are of opinion that the decree is executable against the property as if it belonged solely to the judgment-debtor, We must allow the appeal and set aside the order of the District Judge, Each party will bear his own costs throughout.

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[1] (1888) I. L. R. 16 Cal. 198.
[2] (1910) I.L.R. 33 Mad. 483=20 M.L.J. 546.
[3] (1913) I. L. R. 36 Mad. 141=24 M. L. J. 469.
[4] (1915) 29 M. L. J. 558.
[5] (1918) M. W. N. 175.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE SESHAGIRI AIYAR.

Hari Krishnamurthi ... *Appellant* (5th defendant 6th counter-petitioner.)*

v.

Akella Suryanarayanamurthi and others ... *Respondents (Petitioners 1 and 2 and 2nd counter-petitioner.)*

Limitation, Act, art, 182 (5)—*Application in accordance with law—Application by person* ex facie *entitled to execute the decree—Order of another court restraining execution—Effect of.*

N. obtained a transfer of a decree from the heir of the deceased decree-holder and applied to execute it. He was resisted by G, who claimed to be exclusively entitled to execute the decree, as legatee of the decree-holder. The executing court held that N was entitled to execute the decree and not G. Thereupon G. sued N. and his transferor for a declaration that he was entitled to execute the decree and for an injunction restraining N from executing it. On 14-4-1914 the suit was decreed in favour of G. and N. was restrained by an injunction from executing the decree or otherwise realising the decree amount. On appeal, this decision was confirmed, In the meantime, on 18-6-1914 and 22-10-1914, N. applied to execute the decree but the applications proved infructuous. On 23-3-1916, G. whose rights had by this time been declared by the appellate court, applied to execute the decree and relied on the two intermediate applications by N. as saving limitation.

Held, that the execution applications dated 18-6-1914 and 22-10-1914 by N, were in accordance with law and operated to save limitation under art, 182 (5) of the Limitation Act.

When the two execution applications in question were made, N was, on the face of the decree, the only person competent to execute it and the executing court not having notice of the result of the litigation between G and N. had no concern with the rights of anybody other than the person appearing on the face of the decree as the decree-holder.

Jesoda Daye v. *Kirtibash Dass* [1]. Relied on.

Appeal against the order of District Court of Godavari dated 31st October 1917 in A. S. No. 207 of 1917, preferred against the order of the Court of the Temporary District Munsif of Razole at Amalapur dated 2nd February 1917 in E. P. No. 1460 of 1916 (O. S. No. 55 of 1904 on the file of the Principal District Munsif's Court of Amalapur.)

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* A. A. A. O. No. 34 of 1918. 3rd December, 1919.

[1] (1891) I. L. R. 18 C. 639.

Krishnamurthi v. Suryanarayanamurthi.

Spencer, J.

C. Rama Rao for *P. Narayanamurthi*, for Appellant.

V. Ramesam and *N. Rama Rao*, for Respondent.

The Court delivered the following

Judgments :—*Spencer, J.*—The question is whether the execution petition filed on the 23rd March 1916 to execute the decree in O. S. No. 55 of 1904 is in time and the answer to this question depends on whether the execution petitions filed on 18th June 1914 and 22nd October 1914 by the transferee decree-holder, M. Narasayya, were made in accordance with law. It is true that on those dates Narasayya was restrained from executing the decree or otherwise realising the decree-debt by reason of the decree obtained by the plaintiffs in O.S. No. 835, of 1911, who are respondents in this appeal, and it is argued that, as no execution could take place without an execution petition being presented to the Court, the restraint order would render any application made in that connection by Narasayya illegal, as being in contravention of a decree of court.

On the other hand, it is clear that the only person competent at that date to apply for execution was the transferee decree-holder, Narasayya, whose transfer has been recognised on 30th September 1911 in proceedings to which the grandsons of Narayanamurthi, who are the respondents in this appeal, were parties. The respondents' prior application to be added as supplemental decree-holders had failed by the dismissal of their execution petition on the 23rd October 1910, and they did not again apply to be placed on the record till 23rd March 1916. So that at the date when Narasayya filed his two execution petitions he was on the face of the decree the only person competent to execute it. The executing Court not having notice of the result of the Original Suit No. 835 of 1911, had no concern with the rights of any other person other than the right of the person appearing on the face of the decree as the decree-holder, as it did not then appear that any other person had taken the decree-holder's place. See *Jēsoda Deye* v. *Kirtibash Dass* [1]. As the Court was not then in a position to refuse to admit Narasayya's application and as he acted in the interest of whosoever might ultimately be found entitled to execute the decree in the litiga-

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[1] (1891) I. L. R. 18 Cal. 639.

Spencer, J.

tion when pending, which terminated in the High Court's decree dated 15th August 1917 in appeal against the decree in O. S. No. 835 of 1911, I am of opinion that this application was a *bona fide* one made in accordance with law and that the District Judge was right in treating the present application of the respondents as saved thereby from becoming barred by limitation. As my learned brother is of the same opinion, the lower appellate Court's order returning the execution petition to the first court for execution is confirmed, and the appeal will be dismissed with costs.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.—The facts which have given rise to the question of law are these: One Narayanamurthi, whom I shall hereafter call the testator brought Civil Suit No. 55 of 1904 on a mortgage: he died *pendente lite*: his widow was placed on the record and obtained a preliminary decree. The testator left more than will. There was litigation respecting the genuineness of these testamentary instruments between the widow on the one hand and her daughters' sons who claimed as residuary legatees subject to the payment of a fixed sum to the widow. In the meantime, the widow transferred the decree to one Narasiah. On her application the final decree was passed on the 30th January 1912; he then applied to execute the decree but was resisted by the grandsons. The objection was overruled. The grandsons preferred an appeal against the order permitting Narasiah to execute the decree. It was dismissed *in limine* on the ground that as they were not on the record of the suit as legal representatives of the testator, they had no *locus standi* to prefer the appeal. This order is conclusive of the contention that they were also co-nominee-parties to the decree by virtue of a previous infructuous application. After the dismissal of the appeal, the grandsons brought a regular suit in 1911 to which the widow and Narasiah were parties, but not the judgment-debtor in the first suit. The prayers in the grandsons' suit were for a declaration that they alone were entitled to execute the decree and that Narasiah should be restrained by an injunction from executing it The suit was decided in favour of the grandsons. The terms of the decree are important. It was in these terms: "This Court both

Seshagiri Aiyar, J.

oredr and declare that the defendants or either of them have no right to execute the decree in O. S. No. 55 of 1904 on the file of the Amalapur District Munsif's Court, that the plaintiffs are entitled to recover the said mortgage decree debt by executing the decree, and "*restrain the defendants by means of an injunction from executing the decree or otherwise realizing the decree amount.*" This was passed on the 14 April 1914. Against the decree in favour of the grandsons, Narasiah appealed to the High Court. Pending decision in appeal and apprehending that the decree in the mortgage suit may become barred, he applied on the 18th June 1914 and on the 22nd October 1914 to the Court which passed the decree for execution. They were dismissed and no money was realised by Narasiah. The grandsons applied on the 23rd March 1916 to execute the mortgage decree. It was pleaded that the application was barred by limitation. The bar was sought to be saved by the two applications made by Narasiah in June and October 1914. The question is whether it is open to the grandsons who are the respondents before us to take advantage of these applications as steps-in-aid of execution. The point is free of authority. I am inclined to agree with Mr. Ramesam that the two applications saved the limitation. It is common ground that there was no injunction directed to the Court which passed the decree nor against the judgment-debtor. Can it be said that the personal injunction against Narasiah rendered his application illegal ? Clause 5 of Art. 182 of the Limitation Act provides that the application should be to the proper Court and should be in accordance with law. The applications were certainly to the proper court, because the Munsif was not prohibited from executing the decree. They were in accordance with law, because there was no prohibition against applying to take a step-in-aid of execution. The decree in the respondents' suit which I have set out only prevented them realising monies. The language is "from executing or otherwise realising the monies." The word executing must be read *ejusdem generis* realizing and the word otherwise makes it clear. The prohibition should be understood as applying to the recovery of the money and not as interdicting applications which had the effect of saving limitation.

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Seshagiri
Aiyar, J.

The authorities quoted by Mr. Ramesam, namely *Jasoda Deye* v. *Kritibash Dass*[1] and *Monmoth Nath Mitter* v. *Rakka Chandra Tewary*[2] show that so long as there is a person on the record as a decree-holder, the Court is bound to entertain his application for execution. There has been no order removing Narasiah from his position until March 1916. In my opinion, therefore, the decree was alive in March 1916 and the application of the respondents was in time. Mr. Rama Rao argued that the personal restraint made the applications of Narsiah illegal. To whatever disabilities Narasiah might have exposed himself by applying certainly the applications made by him were such as the executing court was bound to entertain, therefore, they were not illegal. In my opinion the civil miscellaneous second appeal should be dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE AYLING, AND MR. JUSTICE KRISHNAN.

Zamorin Raja Avergal of Calicut by J. A. Thorne Esquire, I. C. S., Collector of Zamorin's Estate, Calicut ... *Appellant* in all (2nd Plaintiff in all the suits.)*

v.

Unikat Karnavan Samu Nair and others ... *Respondents (Defendants).*

Zamorin of
Calicut
v.
Unikat
Karnavan
Samu Nair.

Land Tenure—Malabar Law—Karamkari and Adimayavana tenures—Incidents—Inalienability and forfeitability.—Custom of—Proof—Onus—Quantum—Ignorance of alienee as to incidents of tenure—Effect—Forfeiture—Waiver of—Evidence—Limitation Act, Art. 143—Limitation. Starting point—Knowledge of lessor not material.

Karamkari and Adimayavana tenures are not inalienable by custom in South Malabar and the Jenmi is not entitled to forfeit them on alienation.

The burden is on the landlord to prove the custom of inalienability and forfeitability of such tenures. Evidence relating to *Pravarthianubhavam grants* which are grants for the performance of future services is inadmissible in considering the question of the existence or otherwise of the custom of inalienability and forfeitability as the resumption of *Pravarthianubhavam grants* arises under the general law itself and not from any special custom.

A right of forfeiture of a holding on alienation and even inalienability of it cannot be inferred from the mere existence of a right of escheat in the landlord on failure of the grantee's heirs.

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* A. 1079 to 1083 of 1917. 3rd, 4th, 5th and 6th Dec. 1918 and 8th Dec. 1919.

[1] (1891) I. L. R. 18 Cal. 689.

[2] 10 Cal. L. J. 396 at page 405.

Resumability does not follow from inalienability; the right of resumption and re-entry on alienation must be expressly given.

Prima facie alienation of any portion of a holding will offend against the rule of inalienability if there is one; and unless it can be shown that, under the very custom which imposes the rule of inalienability, the rule does not apply to partial alienations, a partial alienation will be sufficient to work a forfeiture.

Ignorance on the part of an the alienees of inalienable holding as to the inalienability and forfeitability of such a tenure cannot raise any estoppel against the landlord, if he was in no way responsible for such ignorance, nor can the fact that the landlord did not exercise his right of enforcing forfeiture in the case of previous alienations.

Under Art. 143 of the Limitation Act the starting point of Limitation is the forfeiture itself; there is nothing in the article about the lessor's knowledge.

Second Appeals against the decrees of the Court of the Temporary Subordinate Judge of Palghat at Calicut in A. S. Nos. 313, 314, 315, 316 and 317 of 1916 respectively, preferred against the decrees of the Court of the District Munsif of Alattur in O. S. Nos. 437, 353, 472, 371 and 370 of 1914 respectively.

A. Sundaram and *C. V. Anantakrishna Aiyar,* for Appellants.

C. Madhavan Nair and *Kutti Krishna Menon,* for Respondents.

The Court delivered the following

Krishnan, J.

Judgments.—*Krishnan, J.* :—These five Second Appeals arise from five suits filed by the Zamorin Raja of Calicut through the Estate Collector Mr. Thorne, I. C. S., to recover possession of a large number of items of properties belonging in jenmi to the estate, with arrears of rent and future rent, from the persons in possession of them, on payment of the value of improvements and in one case, *viz.*, 1081 of 1917, the amount of a veppu or usufructuary mortgage as well. In two of these cases Second Appeals Nos. 1079 and 1080 of 1917 the properties had been granted on what is known as "Adimayavana" tenure, by a former zamorin and in the three others they were similarly granted on "Karamkari" tenure. These tenures are admittedly permanent tenures but the plaintiff claimed to avoid them on two grounds, *viz.*, that they were in their inception invalid as having been granted by a person who, as a stani, had no power to grant them and secondly that the grantees having alienated the properties they had forfeited under the custom of South Malabar the permanent tenures which they held.

The Lower Courts have held that even if the orginal grants were beyond the powers of the stani who made them they had become validated by adverse possession of the grantees for many years and this finding has not been questioned before us. The findings of the Lower Courts on the 2nd ground taken are in the landlord's favour but his suits have been dismissed by the Subordinate Judge on the ground that the tenants who now hold the properties are all *bona fide* purchasers for value from ostensible owners and that they are entitled to protection on the principle of S. 41 of the Transfer of Property Act though the section does not in terms apply. It is not possible to support this view and the learned counsel for the respondent did not seriously attempt to do so. The deeds of grant in the various cases all expressly state the holding to be either Adimayavana or Karamkari and what was purchased by the defendants was also one or the other of these rights. There is therefore no question of ostensible ownership here at all. If the defendants are right in their contention that no forfeiture was caused by the alienations in their favour, a point which I shall deal with presently, the landlord's suits must fail on that ground and no question of estoppel will arise. Even on the footing that a forfeiture does result on alienation I am of opinion that no estoppel arises against the landlord on the facts stated by the Sub-Judge. He considers that because no express mention of forfeiture is made in the deeds of grant and the law on the point was uncertain till recently and because the Zamorin did not seek to enforce forfeitures prior to these suits though there were several alienations previously an estoppel arises against him in favour of the defendants who purchased the properties for full value. Neither ground stated is a proper basis for raising an estoppel. The ignorance of the defendants as to the legal incidents of the tenures in question, assuming that inalienability and forfeitability are such incidents, for which ignorance the landlord was in no way responsible cannot raise any estoppel against him nor can the fact that he did not exercise his right of enforcing forfeiture prior to these suits bar him from doing so now or raise any estoppel against him ; see observation in *Parameshri* v. *Vittappa Shanbaga* [1]. If the tenures the defendants purchased are forfeitable ones they must take the consequence and cannot complain even if they paid full value. In any case therefore the finding of the Subordinate Judge on the question of estoppel is erroneous and must be set aside.

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[1] (1902) I. L. R. 26. Mad, 157, 161.

This however does not dispose of these second appeals as the learned counsel for the respondents has claimed to support the decrees of the Lower Appellate Court on several points which have been decided against his clients but which he contends were so decided wrongly. He is entitled to do so and we must therefore consider the points raised by him.

The first question he raises is that the finding that the tenures in question here are forfeitable on alienation is incorrect and is not supported by the custom of South Malabar. The Subordinate Judge considered that he was bound by the authority of *Achuta Menon* v. *Sankara Nair* [1] to hold that Karamkari tenure was so forfeitable though he says the law seems uncertain except for the decision and refers to several circumstances which are rather against its correctness. He further held that *Theyyan Nair* v. *Zamorin of Calicut* [2], was an implied authority for holding that the same rule applied to Adimayavana tenure. The learned Vakil for the appellant has supplemented these authorities by referring us to the case in *Venkatagiri Pattar* v. *Zamorin of Calicut* [3], which was one of an Adimayavana tenure. In the view the Sub-Judge took he did not consider a large volume of evidence which the defendants had given to show that alienability was an ordinary incident of these tenures.

It is necessary to examine these authorities to see if we can accept them as settling the question at issue. The earliest case cited *Theyyan* v. *Zamorin of Calicut* [2], was one of an Adimayavana tenure but no question of forfeiture on alienation arose in it. The main question there was whether it was a permanent tenure and it was held that it was. An argument was raised in it that the tenure was a service tenure and as such resumable. This was overruled on the ground that it was not shown to have been granted for future services. This case seems to have no

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[1] (1911) I.L. R. 36 Mad. 380.

[2] (1903) I. L. R. 27 Mad. 202.

[3] (1917) M. W. N. 418.

Zamorin of Calicut. v. Unikat karnavan Samu Nair.

Krishnan. J.

bearing on the present case as no question of. resumption on failure to perform service has been raised here. It is only useful to show that this Court cited and considered the Sudder Court proceedings of the 5th August 1856.

The next case cited *Achuta Menon* v. *Sankara Nair* [1], seems to be more in point. The learned Judges there, after citing the observations in the Sudder Court proceedings of 1856, say " It will be observed that a Karamkari holder in North Malabar has no heritable right at all and with respect to South Malabar the right of reversion in the landlord *prima facie* supports the appellant's contention that the tenure is inalienable." They then point out that the word Karamkari means a permanent right of cultivation and finally relying on the language of the instrument in that case which in terms prohibited alienation hold that the tenure was inalienable and therefore the alienation put an end to the tenure itself. There is no clear and express decision in their judgment that the condition of inalienability is attached to the Karamkari tenure by custom taken by itself. That is the argument in the present cases as there is nothing in any of the deeds of grant before us in any way prohibiting alienation. On this point the present cases are in a way distinguishable from that case. But it must be conceded that to hold as they did, that a clause of re-entry was unnecessary, distinguishing the case before them from the cases cited in *Parameshri* v. *Ittappa Shanbaga* [2] and *Netrapal Singh* v. *Kalyan Das* [3], their decision must be taken to involve the view that the custom made the continuance of possession in the Karamkari holder a condition precedent for the continuance of the tenure itself. With all respect to the learned Judges I am unable to follow the reasoning adopted by them. Assuming that the Sudder proceedings should be treated as authoritative in the absence of anything to the contrary; they do not seem to justify a conclusion as to inalienability. It will be noted that there is nothing stated in them as to inalienability or forfeiture on alienation. The inference of *prima facie* inalienability from the right of reversion in the landlord does not seem to me, with all respect to the learned Judges, to be a necessary or

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1. (1911) I. L. R. 36 M. 380.
2. (1902) I. L. R. 26 Mad. 157
3. (1906) 28 All. 400.

valid inference at all. In fact, according to the ruling in S. A. No. 57 of 1917, the same incident of revertibility exists in the case of the Mulgeni lease of South Kanara to which this tenure is stated to be similar in Græme's Glossary, a work of equal or if not of higher authority than the Sudder proceedings on the point, but it has never been suggested that it is by custom an inalienable right. The terms of this tenure are described in the Glossary under the title Jenmam kozhu which seems to be only another name for it. A permanent right of cultivation of course does not imply inalienability, There is thus no valid basis for an inference of inalienability by custom in the case of these tenures. Moreover the method of inferring the existence of new incidents for a tenure as the supposed logical result of its known incidents seems to me to be quite an unsafe method to adopt. To find out if any particular right is a customary incident of a tenure such as the one we have before us the only safe method is to take evidence of the custom, in the absence of authoritative rulings or statements about it. I am unable to accept 36 Madras Case as settling the question; no authoritative statements on the point have been brought to my notice with regard to the Karamkari tenure in South Malabar.

As regards the Adimayavana tenure the only case cited which is in point is *Venkatagiri Pattar* v. *Zamorin of Calicut* [1]. That decision treats Adimayavana as similar in all respects to Anubhavam and following the ruling in *Ukkandath* v. *Puliyankot Kunhi Kuttan,* [2] which was one of Anubhavam applies the rule of inalienability to the Adimayavana tenure also. Now as pointed out by the learned counsel for the respondents the Sudder Court proceedings as well as Græme's Glossary seem to treat them, as also the Karamkari or Jenmam Kozhu tenure, as having different incidents and probably different origin though they are all of them similar as regards permanency of tenure. It seems to me therefore very doubtful whether it is right to apply what is stated about inalienability regarding the Anubhavam tenure in the Sudder proceedings to Adimayavana. In fact the description given of the latter in Græme's Glossary would seem to suggest that inalienability was not one of its

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[1] (1917) M. W. N 418.

[2] (1914) 27 I. C. 10.

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conditions; for it says with regard to lands that "the tenant could not be dispossessed and the land descended to his heirs and only reverted to the Jenmi on failure of heirs." With regard to parambas or gardens it is more explicit for it says "the garden reverts to the proprietor on failure of heirs on the part of the *adiyan* and if the *adiyan* takes a part with the enemies of his patron the latter may resume the property. Under *any other* circumstances the *adiyan* cannot be dispossessed and he has a right of burial within the garden". There is no discussion of the terms of the Adimayavana tenure in 1917 Madras Weekly Notes case and I am, with all respect, inclined to think that the question as to what are its proper terms should also be settled by taking evidence of custom.

In Chapter XIII of Moore's Malabar Law and custom it is stated that all the above mentioned tenures *i.e.*, Karamkari, Adimayavan aand Anubhavam, appear to be inalienable (page 309) but the learned author also remarks that there is a singular absence of judicial authority in respect of those grants and that at all events the grantor's representatives would be required to prove clearly that the grant was inalienable and resumable.

In these circumstances before deciding the point I would call for a finding on evidence as to the custom about it. There is already a considerable body of evidence on the defendant's behalf on record to prove alienability. The burden is however on the landlord to prove the custom of inalienability and forfeitability as alleged by him as *prima facie* all property should be taken to be alienable. As the plaintiff apparently relying on the rulings above considered, adduced no evidence on the point, I think it is proper to allow him a fresh opportunity to do so and of course the defendants must also be allowed to adduce any further evidence they may want to in their favour. The Court may also call Court witnesses if it thinks fit to do so.

Before leaving this part of the case a special argument raised by the respondents in Second Appeal No. 1081 of 1917 must be mentioned. They contended that as the tarwad of the original grantees were themselves in possession of most of the properties included in the grant and only a few had been alienated to defendants 21 to 23 no forfeiture of the whole holding should be taken to have been worked even if a custom prohibiting alienation generally is established. Their learned counsel relied on the case in *Dassarathy Huri Chunder Mahapattra* v. *Ramakrishna Jana*[1] *Birendra Kishore Manikya* v. *Bhubaneswari*[2] and *Rai Kamaleswari Prasad Singh Bahadur* v. *Maharajah Harbullah Narain Singh Bahadur*[3] in support of his argument. These cases are not in point as they were under the Bengal Tenancy Act where under S. 25 the question is what will amount to an abandonment of the holding. It was held that an alienation of a part will not be an abandonment of the whole and a forfeiture incurred by a part-owner will not bind his co-sharers. The question raised here is entirely different. *Prima facie* alienation of any portion of a holding would offend against the rule of inalienability if there is one and unless it can be shown that under the very custom which imposes the rule of inalienability, the rule does not apply to partial alienations it must be held that a partial alienation will be sufficient to work a forfeiture. The point about partial alienation has not been taken in the lower Courts and we cannot allow it to be raised now and give leave to the defendants to adduce fresh evidence about it. This point must therefore be overruled.

The next point taken for the respondents is that even assuming that alienation would work a forfeiture of the tenure in question the plaintiff cannot rely on the plaint alienations for the purpose as he has waived such forfeiture and recognized the validity of the transfers to the defendants and treated them as his tenants by accepting rent from them through his agents and allowed them to pay revenue to Government out of the rents fixed as provided in the deeds of grant. This is a question which has to be considered on the evidence in each case and with regard to each forfeiture relied on, separately. The munsif upheld the plea in all cases on the facts. But the Subordinate Judge has disallowed them on the common ground that there is no direct evidence to show that the plaintiff had knowledge that the forfeiture had been incurred when the rents were received from and the revenue was allowed to be paid by the alienees. No doubt actual knowledge as distinguished from means of knowledge, is necessary to infer waiver or implied contract as

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[1] (1882) I. L. R. 9 Cal. 526.

[2] (1912) I. L. R. 39 Cal. 903.

[3] 2 Cal. L. J. 369.

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we have to deal in such cases with the intention of the person whose act is said to constitute the waiver or the implied contract. See Foa on Landlord and tenant 5th Edition p. 634 and the case of *Mathew* v. *Smallwood* [1] there cited, as also *Jugmohandas* v. *Pallonje* [2].

The Subordinate Judge however is in error in thinking that the lessor should have been given actual notice of the forfeiture. Knowledge may be inferred from circumstances: and it is not necessary to have direct evidence of it always. The Subordinate Judge has not dealt with the evidence on this point nor has he considered the effect of the nonproduction of the plaintiffs' accounts though he was summoned to produce them. His finding therefore cannot be accepted as satisfactory and a revised finding on the evidence on record with reference to each case must be called for.

It may be observed that the payments pleaded were to the Landlord's agent and not to the Landlord direct. It will therefore be a question for the Subordinate Judge to consider whether those agents had actual knowledge and if so whether under section 229 of the Contract Act, they could not be held to have communicated the information they got to their principal and further whether they themselves had not authority to waive the forfeiture and continue the permanent lease in favour of the transferees so as to bind the principal. These questions were argued before us but cannot be disposed of by us at present as the facts have not been found yet.

The next point argued is one of limitation. The Subordinate Judge's view that time begins to run under article 143 of the Limitation Act only when the landlord comes to know of the forfeiture cannot be supported. The article makes the forfeiture itself the starting point; there is nothing in it about the lessor's knowledge. Nevertheless the finding of the Subordinate Judge that the suits are not barred seems to be correct because the forfeitures relied on in the various cases were all within 12 years from the dates of the suits. The fact that there were previous alienations which the landlord could have but did not take advantage of is not material as the Munsif seems to have considered for it was open to him to waive such forfeitures;

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1. (1910) I. Ch. 777.

2 (1896) I. L. R. 22 Bom. p. 1.

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see 26 Mad. 157, 161, already cited. He must be taken to have waived such forfeitures as he has not relied on them. The question whether any particular transferee has obtained by adverse possession for over 12 years an independent and separate Karamkari or Adimayavana right in the properties in his possession, which is not affected by forfeiture caused by others has not been raised and argued and it cannot therefore be considered.

Finally it was argued as a special point in Second Appeal 1081 of 1917 that the terms of the demise sued on had not been proved. The terms were set out in the plaint and the contesting defendants in their written statements admitted the demise sued on. That being so it was not necessary to prove those terms and we need not therefore to consider whether Exhibit A was properly admitted in evidence or not and the special point taken fails.

In the result, I would call for findings on the following 2 issues allowing fresh evidence on the first issue but on the evidence on record on the 2nd issue.

1. Are Karamkari and Adimayavana tenures inalienable by custom in South Malabar and is the jenmi entitled to forefeit them on alienation ?

2. Has the forfeiture relied on by the plaintiff in any of the five suits been waived ? Findings in 3 months, objections 10 days.

Ayling, J.

Ayling J:—I was content in *Venkatagiri Pattar* v. *Zamorin of Calicut* [1] to follow earlier authority as to the incidents attached to Adimayavana tenure: but in the light of the more elaborate argument now addressed to us, and in view of my learned brother's expression of opinion I agree to call for findings on the issues proposed by him while reserving any expression of opinion.

[In compliance with the order contained in the above Judgment the Subordinate Judge of Palghat submitted the following.

My answer to the 1st issue is that with regard to *Karamkari* and *Adimayavana* tenures there was a custom of inalienability (involving forfeiture on alienation) up to 1896 and that since then there have been inroads into the custom so as to

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[1] 1917 M. W. N. 419

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shake its continuity and uniformity and that the process is going on. On the 2nd issue my finding is in the affirmative as regards O. S. Nos. 353, 370, 437 and 472 of 1914 and in the negative as regards O. S. No. 371 of 1914.

A Sundaram and *C. V. Ananthakrishna Aiyar* for Appellant.

C. Madhavan Nair and *K. Kuttikrisna Menon* for Respondant.

The Court delivered the following

Ayling, J.

Judgments :—*Ayling, J* :—We are now in possession of the findings of the Subordinate Judge on the two issues referred to him : and in the light of the recorded evidence, the Subordinate Judge's discussion of the same, and the arguments addressed to us both at this, and the previous hearing I have little difficulty in arriving at the conclusion that the plaintiff appellant has failed to establish his right to resume the grants on alienation by the grantees.

The Subordinate Judge's finding is so cautiously worded as to be not altogether easy of interpretation. It runs thus :— "My answer to the 1st issue is that with regard to *Karamkari* and *Adimayavana* tenures there was a custom of inalienability (involving forfeiture on alienation) up to 1896 and that since then there have been inroads into the custom so as to shake its continuity and uniformity and that the process is going on. On the 2nd issue my finding is in the affirmative as regards O. S. Nos 353, 370 and 472 of 1914 and in the negative as regards O. S. No. 371 of 1914."

Each party claims that the finding on the first issue is in effect a decision in its favour : but as it is on a question of mixed fact and law, and therefore not entirely binding on us it is unnecessary to devote time to its interpretation—more particularly as I entirely agree in the Subordinate Judge's appreciation of the actual evidence adduced and his conclusion as to the facts established. For the last 20 years or so, for which period alone evidence is available the balance is entirely against the plaintiff's contention. Out of the very large number of assignments by sale and mortgage by the grantees which are in evidence (*vide* para. 41 of the Subordinate Judge's finding) no instance is shown of resumption on alienation in

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case of the tenures with which we are concerned (Adimayavana and Karamkari) : while on the other hand there are many in which the alienations have been acknowledged by the Jenmi, and the tenure renewed in favour of the alienee. Exhibits 89 and 100 and Exhibits 38, 38-*a* and 38-E are particularly striking instances of this. The learned Counsel for appellants invited our attention to Exhibit 93 as indicating a consciousness on the part of the grantee, that he could make no valid alienation without the grantor—jenmi's consent. But in my opinion nothing of the kind appears from a perusal of the document. The document purports to absolutely assign all the grantee's interest in the property and adds, that the grantee has no objection to the assignee enjoying them on the original tenure and to his obtaining a direct demise from the jenmi on production before him of the assignment deed. The latter clause is clearly intended to facilitate the assignee's obtaining an independent title deed from the jenmi—an object naturally desired by the assignee in order to place his rights beyond the possibility of question. But I see nothing in the document to suggest that this was other than a formality which would be granted without demur on production of the transfer deed : and it is one which, as shown by the Subordinate Judge, was frequently dispensed with.

The oral evidence has been rightly appreciated by the Subordinate Judge and on a survey of the evidence as to custom, oral and documentary, the conclusion is irresistible that, for the period to which it relates no legally enforcible custom of forfeiture on alienation has been proved.

The Subordinate Judge has however held that up to 1896 there was a custom of inalienability involving forfeiture on alienation, though the custom has since fallen in desuetude. If this were so, the decision of the question before us would no doubt be difficult : but when the ground of the Subordinate Judge's finding as to the custom in earlier times are examined they seem to me to be unsound. It is based on no evidence, but rather on the authority of the expressions of opinion in the Sudder Court Proceedings of 1856 and in Sir Charles Turner's minute of 1885. In regard to both we have to consider not only what the opinions exactly amount to, but also what degree of authority they should be deemed to carry.

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Appellant is no doubt able to point to previous decisions of this Court in which the proceedings of the Sudder Court have been referred to as authoritative, to one of which (1917 M. W. N. 419) I was myself a party, and in which we were content to follow it. Undoubtedly any statements contained in the proceedings command great respect : but whereas in the present case, we are practically asked to treat them as conclusive of the existence of a legal incident of a tenure, and that too in face of evidence as to the actual existing custom—then I think, speaking with all respect, we must be careful not to give it undue weight. It must be remembered that it is not a judicial pronouncement arrived at on a consideration of legally recorded evidence and of arguments on both sides but merely embodies the general effect of decrees previously passed by the Civil Judges and of opinions of experienced persons respecting the mutual rights of landlords and tenants. The proceedings were issued for the guidance of Subordinate Courts in the decision of future cases : but constituted, of course, no sort of legal enactment : and I see no reason to doubt that the Sudder Court itself would have allowed the correctness of any point therein laid down to be questioned and argued out, if it had arisen in any case that subsequently came before it.

The same remarks apply with even greater force to the observations of Sir Charles Turner. They are contained in a minute prepared by that eminent Chief Justice apparently for the consideration of Government in connection with a draft bill relating to Malabar Land Tenures which was under consideration. I do not think any higher weight can be claimed for them than if they were contained in a legal treatise as an exposition of the learned author's views on the subject under consideration.

Apart from their authority what do these dicta amount to? In the case of the Sudder Court proceedings all that appellant can point to is a marginal note in which Adima Jenmam (but not Karamkari) is defined as "permanent but inalienable right." There is no suggestion of inalienability in the text regarding either tenure : though in the case of Anubhavam tenure which is dealt with in an intervening paragraph, there is a statement that the tenant cannot alienate his title I think it

Ayling, J.

would be most dangerous in such circumstances to attach much weight to the marginal note.

Sir Charles Turner in his minute says that adima grants "are not alienable except with the consent of the landlord." Whether he meant to imply that the landlord possessed a right of resumption on alienation is not clear; it does not necessarily follow and it is curious that the very sentence from which these words are quoted concludes thus "and on failure of heirs revert to him" (*i.e.*, the landlord). He does not say "on failure of heirs or on alienation."

As regards "Karamkari" tenures he says nothing about inalienability.

Now that the authority and purport of these pronouncements have been directly challenged, the only conclusion I can come to is that as the basis of a finding of the existence of a custom unsupported by other good evidence, they are altogether inadequate.

The other authorities to which our attention has been drawn Graeme's Glossary, Moore's Malabar Law and the District Manual all seem to be against appellant's contention: and my conclusion is that while the evidence of custom in the last 20 years is strongly against the existence of the right of forfeiture, there is no reliable evidence of its existence at any earlier period.

This disposes of the appeals; and it is unnecessary to consider whether, if the right of forfeiture exists, it was waived by the appellant, in any of the cases with which we have to deal. I may merely record that I see no reason why the Sub-Judge's finding on this point should not be accepted. As a result I would dismiss these second appeals with costs.

Krishnan, J.

Krishnan, J :—The learned Subordinate Judge has now submitted findings on the 2 issues remitted to him. Both sides have filed objections to them. It is however sufficient to consider the finding on the 1st issue as to custom for the disposal of these second appeals.

The Subordinate Judge found on that issue that a custom entitling the landlord to resume the holding on alienation thereof by the grantee existed prior to 1896 but had since then fallen into desuetude. The existence or non-existence of an alleged custom is a mixed question of fact and law and it has now been settled by the Full Bench in *Kumarappa Reddi* v. *Manavala Goundan* 1 that a finding about it is revisable by the High Court in second appeal. We must therefore see how far the accepted evidence in the case and the authorities relied on by the Subordinate Judge support his finding or are against it.

The Subordinate Judge has very properly made an elaborate enquiry into the existence of this alleged custom including the examination of several Court witnesses. The effect of that evidence both oral and documentary has been in my opinion very correctly stated by him, when he says that it does not establish the existence of the alleged custom but on the other hand it disproves it. The documents relating to Pravarthi anubhavom grants which are grants for the performance of future services were rightly discarded by him as the resumption of such grants arises under the general law itself and not from any special custom. The numerous documents filed by the defendants including, as the Subordinate Judge says, many assignments, mortgages and court sales of holdings under Karamkari and Adimayavana and similar tenures, without having worked any forfeiture in fact, are in my opinion strong evidence on their side. I agree with the Subordinate Judge that on the other hand the documents filed on the plaintiff's side seem to lead to no inference of a conclusive character and they are entitled to little weight as against the evidence of the defendants. I am not discussing the documentary and oral evidence in detail as the Subordinate Judge has done so and I agree with his observations regarding it.

The complaint that the plaintiff was handicapped by not being given sufficient time to adduce his evidence seems to me to be entirely baseless. If he really wanted further time he should have applied to this Court for it; but he did not do so. As it is, I observe that he has adduced in evidence documents belonging to several big jenmis in South Malabar such as those of Guruvayoor Devaswom, Kavalappara Estate, Kuthiravattam Estate, Thiruvilwamala Devaswom, Theriprayar Devaswom and Thiruvanchikulam Devaswom besides those belonging to his own Zamorin's Estate.

I accept the Subordinate Judge's finding so far as it is in favour of the non-existence of the alleged custom on the

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1. (1917) I. L. R. 41 Madras 374 ; 34 M. L. J. 104.

evidence in the case. But in agreement with my learned brother I am of opinion that he is wrong in his finding that such a custom existed prior to 1896. Though the evidence now given does not go back further than 1896 there is no indication in it of any break or change in the custom at that date. It will therefore be a perfectly legitimate inference to hold that it indicates that the same state of affairs existed even prior to 1896. But the Subordinate Judge thinks that the statement about the incidents of the tenures in question in the sudder proceedings of 1856 and the opinion of Sir Charles Turner, C.J. in his well-known minute on the draft bill relating to Malabar land tenures justify the inference that the alleged custom existed in 1856 and later.

The sudder proceedings were brought to our notice at the former hearing and were given their due weight by us before we called for findings. There is nothing express in them in favour of the plaintiff's contention. As regards Karamkari tenures, it is not stated in them that they are even inalienable much less that they are resumable on alienation. I have already pointed out in my remand order that it is entirely illogical to infer a right of forfeiture of a holding on alienation and even inalienability of it from the mere existence of a right of escheat in the landlord on failure of the grantee's heirs. An estate terminable on the happening of an event does not thereby become inalienable. As I pointed out to the learned counsel for the plaintiff at the time of this hearing a life estate is such an estate; but nobody ever contended that it was therefore inalienable. We have in the mulgeni tenure in South Kanara an exact case of a permanent tenure where the right of escheat exists coupled with unrestricted alienability. As regards the adimayavana tenure, the text of the proceedings expressly says the land is not resumable except where it is given for performance of future services. That of course is not the case in the present suits. To rely upon a marginal note to say that such land is inalienable in such a case and to infer further from it that it is also resumable on alienation as the Subordinate Judge has done seems to me to be unsupportable. The Subordinate Judge also seems to have failed to keep in view the distinction between inalienability and resumability. The one does not follow from the other ; the right of resumption and re-entry on alienation must be expressly given. See *Parameshri* v. *Vittappa Shanbaga* [1] and *Netrapal Singh v. Kalyan Das*, [2]; it cannot be inferred from inalienability alone.

The Sudder Proceedings do not thus in my opinion give any support to the Subordinate Judge's view. Even if it were otherwise I would have no difficulty in agreeing with my learned brother that we should not give them undue weight and treat them as conclusive. My learned brother has also dealt with the opinion of the learned Chief Justice in his minute and I fully agree with his view and have nothing further to add regarding it. The other authorities as observed by him are not in plaintiff's favour and I have already considered in my remand order the reported cases cited as bearing on the question before us.

In this state of the authorities, considering the evidence now adduced the only proper conclusion to come to in my opinion is to hold that plaintiff has failed to prove the existence at any time of a custom entitling the landlord to resume, on alienation, lands granted by him on Karamkari or adimayavana tenure where they are not proved to have been granted for performance of future services. In conclusion I would observe that it is to be regretted that the Subordinate Judge did not pay more attention to the observations in the remand order.

On the above view no decision on the question of waiver is necessary. I agree to the order proposed by my learned brother.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR, AND MR. JUSTICE MOORE.

Muthusami Gurukkal ... *Appellant.** (*Plaintiff*).

v.

Meenammal, and others ... *Respondents* (*Defendants* 1 *to* 4 *and* 6 to 8).

Muthusami Gurukkal v. Meenammal.

Hindu law—Inheritance—Exclusion from—Grounds—Insanity—Effect—Joint family—Insane member—Right to take family property by survivorship.

In a joint Hindu family consisting of a father and his son, the father became insane after his son attained majority, survived his son, and died without recovering

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* S. A. No. 2294 of 1917, 5th Nov. 1919.

[1] (1902) I. L. R. 26 Mad. 157.

[2] (1909) I. L R. 28 All. 400

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sanity. In a competition between the father's and the son's heirs, *held*, that the father did not lose his right in the family property by becoming insane, and took the whole property by survivorship on the death of his son and that the fathers' heirs were entitled to the same in preference to those of the son.

Insanity, to be a ground of exclusion from inheritance, need not be congenital. The rule in Ch. ii, S. 10, placitum 6 of the Mithakshara that a person is excluded, if he is disqualified at the time of partition, is not a pronouncement that the right ripens and is capable of enforcement only then, but a principle indicating who all should be allotted shares at the division The right of a member of a joint Hindu family to share in family property comes into existence at birth and subsists all through, although it is incapable of enforcement at the time of partition because of the disqualification then existing.

Second Appeal against the decree of the District Court of Madura in Appeal Suit No. 364 of 1916, preferred against the decree of the Court of the Principal District Munsif of Dindigul in Original Suit No. 1332 of 1912.

The Court (Seshagiri Aiyar and Phillips, JJ.) delivered the following

Judgment :—The Judgment of the District Judge proceeds on the footing that the son predeceased the father; and then he discusses the question of law on the assumption that the father was insane for years and died a mad man. Mr. Srinivasa Aiyangar argues that if the assumption is well-founded, the view of the law taken by the District judge is wrong. Mr. Venkatarama Sastri on the other hand argues that unless the nature of the father's insanity is distinctly found, the question of law would not arise. The plaintiff ought to have asked for an issue on this question, but however, as the judgment appealed against proceeds on the assumption that the father was insane, we think it desirable that a distinct issue as to the nature of the insanity should be tried, before dealing with the question of law. As it was the fault of the plaintiff that such an issue was not raised earlier, we think he ought to pay all the costs of the defendants in any event in the Court of First Instance, as well as the costs of the enquiry we are now directing. We must ask the District Judge to return findings on these questions :—

(*a*) Was Gangadara insane ?

(*b*) If so, for how long and till when ?

(*c*) Was the insanity of such a nature as to disqualify him from holding property under the Hindu Law ?

(*d*) Was the son's widow in enjoyment of the office and emoluments after her husband's death as his heir ?

[The District Judge submitted the following findings (1) that Gangadhara was insane ; (2) that he was insane before his son's death and from 10 to 20 years of his own death; (3) that the insanity was of a mild type of mental collapse and not a virulent form; (4) that the son's widow did not enjoy the office and emoluments after her husband's death as his heir].

K. Srinivasa Aiyangar, for Appellant.

T. R. Venkatarama Sastri, for Respondent.

The Court delivered the following

Seshagiri Aiyar, J.

Judgments :—*Seshagiri Aiyar, J.*:—The facts on which we have to give our decision are now undisputed. Gangadara was entitled to an Archaka service in a temple. He was sane at birth, but subsequently became insane. He had an only son, Subbiah. After the son attained majority, the father became insane and died in 1880 without recovering sanity. Subbiah, during this period was in sole possession of the Archaka Office. He predeceased his father. (It is said that he died in 1874). Subbiah left a widow Kuppammal who died in 1911. Gangadara's widow Pappammal died in 1912. Plaintiff sues as reversioner of Subbiah, the son. Defendants are the daughter and grandsons of Gangadara. They are sister and sister's sons of Subbiah. If the property belonged to Subbiah, the defendants being only the sister and sister's sons of the owner will be excluded by the plaintiff. If, on the other hand, Gangadara was the owner at the time of his death, the defendants as his daughter and daughter's sons would exclude the plaintiff. The principal question for decision is whether by Gangadara having become insane, Subbiah became the sole owner by survivorship to the exclusion of his father.

A subsidiary question is whether the two widows, mother-in-law and daughter-in-law enjoyed the property in such a manner and with such intention as to have prescribed for a half share each.

The main point for consideration is practically one of first impression. We have to examine the texts of Hindu Law for arriving at a decision. The case was argued with

Muthusami Gurukkal v. Meenammal.

Seshagiri Aiyar, J.

conspicuous ability on both sides as may be expected of the learned Vakils engaged on either side.

I shall first dispose of the extreme contention put forward by Mr. Venkatrama Sastriar for the respondent. He contended that unless insanity is congenital, there is no exclusion from inheritance. On this question there is direct authority. In *Deo Kishen* v. *Budh Prakash*, [1] a Bench of five Judges, after examining the texts of Hindu Law decided that insanity need not be congenital. In *Murarji Gokuldas* v. *Parvathibai*, [2] the same view was expressed. Before the Judicial Committee in *Baboo Bodhnarain Singh* v. *Baboo Omrao Singh*, [3] the position was taken for granted that insanity need not be congenital. As against these decisions, we have *Shanku* v. *Puttamma* [4]. The learned Judges one of whom was Mr. Justice Muthuswami Ayyar, very summarily dealt with the question. They do not quote the cases I have referred to, nor do they discuss the texts of Hindu Law. *Raghava Mudaliar* v. *Narayanasami Mudaliar* [5] a later decision of this Court is not consistent with *Shanku* v. *Puttamma* [4]. However, as there is a direct decision of this Court on the point, I shall deal with the texts relating to it. Mr. Venkatrama Sastriar conceded that the word in Manu's text, Chapter IX, Sloka 201 'Unmatha' (mad) was not qualified by the word 'Jathi' (from birth, I which governs (Andhha, vadhiran), the blind and the deaf. This is indicative of the view that other defects considered in the text need not be congenital. Mr. Justice Sadasiva Ayyar has held regarding blindness, mentioned in the same text that the rule is obsolete. I am unfortunately unable to apply that principle to the present case. Courts here and the Judicial Committee have regarded this injunction of law as a living principle. I must perforce give effect to it. The argument of the learned Vakil for the respondent was directed to showing that of the three disqualifications mentioned together under this head, namely, idiocy, insanity, and dumbness, the first and the last must necessarily be congenital; and that consequently, the middle one must have been included by the sage as partaking of the same character. In the first place, it is not clear that *Makatva*, (dumbness) would operate as an exclusion, only if it is congenital. It is true that

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1. (1888) I. L. R. 5 All. 509,
2. (1876) I. L. R. 1 Bom. 177.
3. 13 M. I. A. 519.
4. (1890) I. L. R. 14 Mad. 289.
5. (1893) 4 M. L. J. 88.

it has been held in some cases that the text under discussion must be restricted to congenital dumbness. From a decided case to impute to the text writer that he regarded that dumbness can never be anything but congenital is not an easy process. The learned Vakil suggested that a dumbness that supervenes was not really what Manu meant ; such supervening dumbness may not exclude the person from inheritance, but I am not prepared to say that it cannot be permanent, if it is not congenital. I must therefore hold that it has not been proved that all the three instances classed together by the author are examples of congenital defects. No doubt idiocy is not a supervening disease. We have therefore this situation. Three disqualifications are enumerated. One of them is *prima facie* congenital another need not be: the second is more often than not a supervening disease. In these circumstances can it be contended that the authors by referring to them as a class intended to indicate that as these disqualifications *ex-nessitate* must relate to what exists from birth, it was superfluous to prefix them with the adjectival clause Jathi 'from birth,' as he did with regard to another category of disqualifications. I am not prepared to take this view. According to Mimamsa rules of interpretation, an adjective qualifying one clause should not by implication qualify a different clause. In this view, the word 'Jathi' does not govern 'Unmatha.' The learned Vakil for the respondent quoted the opinion of Sarbhadhikari at page 962 of his book in favour of his contention. The author does not express any definite conclusion. Nor Colebrooke's digest Vol. II 32 is a considered opinion. I am not prepared to disagree with the view of the Full Bench of the Allahabad High Court (*Deo Kishen* v. *Budh Prakash* [1] on this question.

I shall now deal with the main question. The portion relating to exclusion from inheritance finds a place in Chapter II, S. 10 of Mitakshara. It need hardly be mentioned that chapters, sections and placita owe their existence to Mr. Colebrooke's labours and not to any arrangement by the Commentator himself. Vignaneswara only makes a running commentary on the texts of Yagnavalkya which he quotes as he proceeds. The whole discussion, in this part of the subject, begins with a discussion of the meaning and attributes of *Daya*. I shall not

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1. (1883) I. L. R. 5 All. 509.

attempt its definition here. The preamble to S. 10 (which has been described as placitum 1) states, "The author states an exception to what has been said by him respecting the succession of the son, the widow and other heirs, as well as the reunited parcener." Then follows Yagnavalkya's text, Sloka 140. Then definitions of the various expressions in the text are given. Unmatha, 'A madman' is thus defined—"affected by any of the various sorts of insanity proceeding from air, bile, or phlegm, from delirium, or from evil spirits." This is in placitum 2. Placita 3, 4 and 5 further explain the text. Then we come to placitum 6...." They are debarred of their shares, if their disqualification arose before the division of the property. But one already separated from his co-heirs is not deprived of his allotment. Placitum 7 refers to cases in which the disqualification subsequently disappears. The Commentator says that such cases will be regulated by the same principle by which sons born after a partition are provided with a share. Placitum 9 is important. The Commentator begins the examination of the next text of the Smrithi by this preamble. The disinherison of the persons above described seeming to imply disinherison of their sons, the author adds and then quotes the text which is in these terms:— "But their sons whether legitimate, or the offspring of the wife by a kinsman, are entitled to allotments, if free from similar defects" and comments on it in the 10th placitum onwards. Placitum 10, says, "The sons of these persons, whether they be legitimate offspring or issue of the wife, are entitled to allotments, or are rightful partakers of shares, provided they be faultless or free from defects which should bar their participation, such as impotency etc." This corresponds to Manu, Chapter IX, Sloka 203. These are the only citations relevant for the purpose. A few general observations may be made here before examining the contention of the learned Vakils.

(*a*) The rules enunciated in this chapter are exceptions to the general principles of inheritance. Consequently they should be construed strictly. As far as possible, deducing by analogy a class of exceptions not clearly covered by the words should be avoided. The Hindu Law is no exception to the rule that it would lead Courts into a false position to hold that every rule must be given its legical extension. This caution is specially necessary in regard to suggestions to multiply exceptions.

(*b*) The rules are expositions, partly from usage and partly from an attempt to reconcile conflicting Smrithi texts, of the views of the Commentator. He found a state of society which demanded change. To satisfy this demand, while doing lip service to the inviolability of the written word, he not unfrequently takes liberty with the text. Therefore care should be taken not to confuse the orginal injunction with its subsequent emendations. For example, the analogy of the after-born son is not in the particlular text of Yagnavalkya relating to this subject. What Vignaneswara did was to find a pretext for obviating an injustice. He found in Sloka 123 of the Smriti a rule relating to after-born sons. He introduced that as a good and reasonable solution of the problem relating to the recovery of normal health by the disqualified heir. This analogy in some cases has been pushed too far in some decisions and by some writers on Hindu law. It is at least doubtful whether Vignaneswara intended that this rule should be subjected to a searching examination by the importation of all the difficulties with which the rule about the share of the after-born son bristles.

(*c*) Ideas which we find imported into the discussion of this question by speaking of the inheritances 'Vesting of' 'Being divested' ' of the succession opening on the death of the father &c.,' which may have meaning when applied to Jeemutha Vahana's exposition of Hindu Law are not correctly applied to Vignaneswara's School of law. The reiteration by the latter that property is by birth should be carefully borne in mind. This last observation is specially applicable to dicta in some of the decided cases. It appears to me that in these decisions instances relating to survivorship have been considered as if they were cases of pure inheritance and of collateral succession.

Now I shall proceed to consider the two theories advanced. Mr. K. Srinivasa Ayyangar's contention amounts to saying that a son of a Mitakshara father has only the potentiality of taking a share, and that that potentiality is lost by his being subject to any of the disqualifications enumerated. The moment that the disqualification, patent or latent, exhibits itself, he must be

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put aside subject only to his having the right of maintenance; on his emerging free from the disqualification, the potentiality revives; and if he is alive at the time of partition in this reformed condition, he will take a share.

Mr. Venkatarama Sastriar's contentoin, on the other hand is that the son is a sharer or share-taker from the moment of his birth. He ceases to be the share-enjoyer when he is subject to the disqualification. His right is not lost, but is only in abeyance; and the provision for maintenance is not a deprivation of the inherent right but a beneficient provision for management of the property so long as the disqualification lasts.

A great deal has been said and can be said in favour of either of these contentions. I do not think that an examination of the reasons for the exclusion would help us much in deciding the question. I might briefly refer to it, as it has some bearing on the point. Visvarupa, a Commentator of the Yagnavalkya Smriti (and who wrote his dissertation before Vignaneswara) seems to have been very sceptic about the resonableness of the process of exclusion. He refutes the idea that the exclusion is based on the theory of sin in the previous birth, and cites instances to show that heirs of whom it can safely be predicted that they were sinners are among those to whom unqualified inheritance is given. He also rejects the theory that inability to perform religious rites in this birth might have been the ground for exclusion. Here again he quotes instances. His view seems to be "We find the exclusion there and we must perforce accept it." If the exclusion is not based on original sin or subsequent incapacity to offer oblation and the like, the suggestion that it was due to a belief in the inability of the heir to manage temporal affairs appears more plausible. Very likely the rule is an outcome of a hazy notion that the property should be preserved for the disqualified person by those who are related to him. The law as to guardianship has developed much in later days. Even now it is not perfect. It looks as if the old law-givers by providing for maintenance did not intend to deprive the heir of his inheritance, but only to provide for its management during incapacity.

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Mr. Srinivasa Ayyangar in analysing the placita relating to the periods of partition contended that the right to a share is only predicated on the contingency of the heir existing in a normal condition at the time partition is made. It is true that if the sharer dies undivided before the actual partition takes place, the property will be distributed as if he was not born at all. In answer to the suggestion that this theory is inconsistent with giving rights to his son or grandson in the father's share, the learned Vakil argued that these persons are specially mentioned. It seems to me that the rule in placitum 6, S. 10 that a person is excluded, if he is disqualified at the time of partition, is not a pronouncement that the right ripens and is capable of enforcement only then, but a principle indicating who all should be allotted shares at the division. The principle of *right by birth* which Vignaneswara insistently enunciates would become nugatory if a bare potentiality is assigned to that right.

The other view receives considerable support from Saraswati Vilasa, a treatise which is a binding authority in this part of India. The author quotes Manu in placitum 148 and then comments on it in placita 149 to 157. He says "From this coupling together, it follows that they have shares, but that they should, though having shares, be supported as they could marry." The view is that if any of the excluded persons is capable of marriage and of begetting children, their shares should be managed for their benefit and should be given maintenance. This seems to follow from Manu, Chapter IX, Sloka 203. The professors of the Science of Eugenics may rightly protest against this tacit assumption by the ancient sages that an insane person can marry; but so long as the State does not prohibit such marriages the law cannot be abrogated. The ancient law-givers even provided for the begetting of children on the wife of the incapacitated person. They seem to have been as anxious for giving facilities for the procreation of children, as some of the sanest publicists in these days and the heads of states are, after the Great war, to recognise and encourage the rearing up of offspring however begotten. However that may be, the view of the author of Saraswathi Vilasa is more in consonance with the view that the right exists but is

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only obscured for the time being. Mr. Srinivasa Ayyangar suggested that the parenthetical clause about capacity for marriage suggested by the author of the Saraswati Vilasa does not destroy the root doctrine that the right is enforceable only, if and when there is full mental capacity at the date of partition. But the author distinctly says that the share should be managed because of the possibility of marriage, thereby indicating that it exists and is not lost altogether. My conclusion, therefore is that the right comes into existence at birth, subsists all through, although it is incapable of enforce ment at the time of partition, because of the disqualification then existing.

Mr. Srinivasa Ayyangar drew our attention to the statement in Steel's Law of Custom in which the author says that the custom is to regard the insane man as entitled to a share, although he is not given the enjoyment of it.

Coming to the decided cases, in *Ragava Mudali* v. *Narayanaswamy Mudaliar,* [1] there is an *obiter dictum* to the effect that if a Hindu father dies leaving ancestral property and a son insane at the time of his death, the son is not entitled to take the property. The dictum was not necessary for the case and curiously enough, *Shanku* v. *Puttamma,* [2] where a contrary view was taken was not considered in this judgment. In this latter case which relates to the inheritance of an Aliya Santana family in South Kanara it was decided that the surviving member who was a female and was insane was the owner of the property. I have dissented from this judgment in so far as it relates to the question that insanity should be congenital. *Krishna* v. *Sami* [3] does not affect this case directly. That was a case relating to a right of the sons of a deaf and dumb member. It was held that the fact that the father was disqualified and that the sons were born after the death of their grandfather did not disentitle them to take their father's share. The learned Judges after examining the texts seemed inclined to hold that property vested on the birth of the heir. However the present question was not considered in that case. These are all the Madras authorities. There are some cases in Calcutta which are not quite reconcilable with each other. The earliest of them is in *Balgobinda* v. *Lal Bahadur*, [1]. The case related to the lunacy of one Ramsahai. He seems to have given his name to a number of cases on this point. It is clear from this case that a committee was appointed to manage his share. This decision impliedly supports the view that insanity does not operate as deprivation of the birthright. The next case in which also the insanity of the same individual was in question is *Ram Sahye Dhukkhut* v. *Lala Laljee Sahye* [2]. There are conflicting dicta in that judgment which render it valueless as authority. The suit was brought to recover property on behalf of the lunatic. The learned Judges while holding that he had a right to the property refused to disturb the alienees on the ground that if he was to recover the property, he would not be in a position to have it partitioned. Another decision in that same volume relating to the insanity of the same individual is *Ram Soonder Roy* v. *Ram Sahye Bhugut* [3]. Both these cases were considered in *Abilakh Bhagat* v. *Bhekhi Mahto*,[4] which again was a case relating to the insanity of the same individual; it was held that the right to property existed although the right to its enjoyment was unenforceable. Princep, J., was of opinion that the earlier decisions in VIII Calcutta were not good law. These are the Calcutta decisions, In Allahabad there is a direct decision in *Tirbeni Sahai* v. *Muhammad Umar*, [5] but the learned Judges speak of succession opening on the death of the father which would not be right in the case of a Mitakshara son. *Ram Sing* v. *Mussamat Bhani* [6] was a case of pure inheritance. In *Man Singh* v. *Musammat Gaini* [7] the learned Judges took the view enunciated in *Abilak Bhhagat v. Bhekhi Mahto* [4]. These are all the cases on the point.

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[1] (1898) 4 M. L. J. 88. [2] (1890) I. L. R. 14 Mad. 289.

[3] (1885) I. L. R. 9 Mad 64. (F. B.)

None of them deals with the exact question we have to decide. The dicta in some of them however support the view I have taken.

The next point which Mr. K. Srinivasa Ayyangar pressed upon us is that the Lower Appellate Court has not given a correct finding on the question of prescription which we

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1. (1854) 10 Sadar Divani Adalut p. 244, 13 Ind. Dec. O. S. 941.
2. (1881) I. L. R. 8 Cal. 149.
3. (1882) I. L. R. 8 Cal. 919.
4. (1895) I. L. R. 22 Cal. 864.
5. (1905) I. L. R. 28 All. 247.
6. (1915) I. L. R. 38 All. 117.
7. (1917) I L. R. 40 All. 77.

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asked him to decide. The question arises in this way After the death of Subbiah, the son, his widow and the wife of Gangadara were doing the Puja service in the temple. There is evidence on both sides which indicates that they were enjoying the worship in equal turns. The District Judge has not discussed this evidence. For example there is the written statement, paragraph 3, which suggests this ; paragraph 4 also may be referred to. There are Exhibit I and Exhibits III, T and J. There is the deposition of D. W. 1. Although there was no issue about prescription in the First Court as the question there was as to who died first, whether Gangadara or Subbiah, the point is one which does require adjudication having regard to the view I took of the case. I must therefore reverse the decree of the District Judge and remand this appeal to him for disposal on the question whether the widow of Subbiah had prescribed for a half share in the property after the death of her husband, and if so, whether she acquired a right to it at the time of her death. It may be necessary to take fresh evidence in the case because it is possible that the enjoyment of Subbiah's widow was in lieu of maintenance or it may be that Gangadara's wife out of affection allowed her to enjoy the turn of worship. These matters have not been elucidated because there was originally no issue on this question. With these observations I must remand the case for disposal to the Lower Appellate Court. The parties will pay and receive proportionate costs in this Court and the costs in the Lower Appellate Court will abide the result.

Moore, J.:—I agree.

A. S. V.

IN THE PRIVY COUNCIL.

PRESENT:—LORD ATKINSON, LORD PHILLIMORE, SIR JOHN EDGE, AND MR. AMEER ALI.

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Raghubar
Singh
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Indra
Bahadur
Singh.

Raj Raghubar Singh and another ... *Appellant.**
v.
Thakur Jai Indra Bahadur Singh ... *Respondent.*

Sureties—Security for performance of appellate decree—Whether limited to first appellate decree—Liability of sureties, how enforced—Whether a separate suit is required—Form of security bond—Enforcement of liability against sureties when no

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* P. C. Appeal No. 104 of 1918, Oudh Appeal No. 11 of 1917.
June, 30th July 1st and 29th 1919.

obligee is named—Procedure when the sureties are not personally liable—Code of Civil Procedure, 1908 (*Act V of* 1908) Ss. 47, 144, 145, 151—*Civil Procedure Code* 1882 (*Act XIV of* 1882) *S.* 546—*Transfer of Property Act*, 1882 (*Act IV of* 1882) *S.* 90.

Sections 47 and 144 of the Code of Civil Procedure 1908 provide for the decision of questions relating to the execution, discharge or satisfaction of a decree and for restitution, including the payment of mesne profits, when a decree has been varied or reversed : and they enact that any such questions shall be determined in the suit and not by a fresh suit. These sections do not apply to sureties and do not authorise the inclusion of the sureties as parties to proceedings under them. The sureties are however bound by the assessment of damages made in such proceedings as between the parties to the suit.

Semble. that the Court to which application is made to enforce an instrument of suretyship if it thinks there has been no real trial of the amount of mesne profits might, upon terms, admit the sureties to question the amount.

The sureties are, however, entitled to have their liability upon the instrument determind in a regular manner. When the instrument is in a form making the sureties liable to some named obligee this may be done by means of a regular suit : but such procedure is inapplicable when no obligee is named and where the liability is not personal.

In such a case when the Court is satisfied that the liability exists, it should make an order in the suit upon an application to which the sureties are made parties, that the property charged be sold unless by a named date the sureties find the money.

Appeal from a decree of the Judicial Commissioner of Oudh., dated November 20, 1916, affirming a decree of the Subordinate Judge of Malihabad.

The facts of the case are sufficiently stated in their Lordship's judgment, where also the terms of the security bond are set out. The Subordinate Judge held that the sureties (the appellants) were liable to the extent of one lakh, and an appeal against his decision to the Judicial Commissioner was dismissed. On the present appeal.

Dunne, K.C. and *E. B. Raikes*, for appellants, submitted that the Subordinate Judge had no jurisdiction to make the order appealed from, declaring the liability of the sureties. All that the Judicial Commissioner had directed him to do was to find the amount of the mesne profits. The Code of Civil Procedure governing the proceedings at the time in question was that of 1908. Under that Code there was no power to make the appellants parties to the proceedings. Ss.47 and 144 refer only to applications by and against the parties themselves. S.145, which deals with sureties, applies only where the surety is personally liable. This is not the case here.

Further, even if the Court had jurisdiction, the procedure actually adopted was inappropriate. It was held over and over again under the old Code that you could not proceed against the properties in execution, when the security was the hypothecation of immoveable property; you must proceed by regular suit. *Tokham Singh* v. *Girwar Singh* [1].

The bond could only be enforced by a suit under S. 90 of the Transfer of Property Act.

Further, the liability of the sureties ceased when the appeal for which they became sureties was dismissed. This is clear, not only from the terms of S. 546 of the old Code, under which the security was taken, but from the order in pursuance of which the bond was executed. *Prima facie* security given pending an appeal relates only to the pending appeal: if that appeal is dismissed the security is gone: *Ranee Birjobuttee* v. *Pertaub Singh* [2].

What the Code contemplates is security to be given for the execution of the decree of the court taking security; *Sheik Suleman* v. *Shibram Bhikaji* [3].

The decision in *Narayan Dey* v. *Gajanan Dikshit* [4] turned upon the special terms of the bond then in question.

In any case the Courts in India erred in making a personal decree against the appellants.

De Gruyther, K. C and Kenworthy Brown, for respondent: The application here was for the assessment of mesne profits and for a declaration of the liability of the opposite parties: we did not ask for an order to bring the property to sale: that would be matter for a further proceeding. Upon the application which we made the sureties were properly made parties, and their liability has been limited, as was just, to the amount covered by the bond.

As to the procedure for enforcing the liability, the Allahabad High Court held under the old Code that S. 253 of that Code applied. *Janki Kuar v. Sarup Rani* [5].

Sections 47 and 144 of the new Code empower the Court to make the order it has made here. S. 144 is not part of the execution procedure and its application is not limited to the parties.

The bond here did not name any obligee. Under the old Code such bonds were sometimes made in favour of an officer of the Court, and it was then feasible to assign them to the successlul party to sue upon: but this could not be done here.

The Court retains its inherent jurisdiction to make such orders as are necessary for the ends of justice—S. 151 of the new Code—and this is the case whether or not S. 145 also applies.

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[1] (1905) I. L. R. 32 Cal. 424.

[2] (1860) 8 Moore, I. A. 160, 163.

[3] (1887) I. L. R. 12 Bom. 71.

[4] (1873) 10 Bom. H. C. Rep. 1.

[5] (1894) I. L. R. 17 All. 99.

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(Reference was also made to *Prasanna Coomar Sanyal* v. *Kasi Das Sanyal* 1 and to O. 21 R. 2).

Dunne replied: The Subordinate Judge had no power to declare any liability against me: he could not make any order against the land. The only section of the new Code affecting sureties is S. 145, which does not apply here. S. 144 is merely an enlargement of the old Section 533, and is confined to the parties.

If the Subordinate Judge had no jurisdiction to make the order appealed against, the acquiescence of the parties cannot give him jurisdiction. *Maha Prasad* v. *Ramani Mohan Singh* 2 *Ledgard v. Bull* 3.

Their Lordships' judgment was delivered (29th July '19) by

Lord Phillimore.

Lord Phillimore.—This is an appeal from the Court of the Judicial Commissioner for Oudh.

Thakur Balbhaddar Singh, Talukdar of Mahewa, died in December, 1898, intestate and childless, leaving the taluka and other property, and leaving a widow, Raghubans Kunwar, and a brother Sheo Singh.

On his death his brother Sheo Sing took possession of all his property; but his widow, Raghubans Kunwar, brought a suit against Sheo Singh to recover the property in the Court of the Subordinate Judge of Sitapur, and on the 6th August, 1902, obtained a decree for possession of the same.

After she had obtained this decree the widow applied to be put into possession of the property in dispute, and she was given possession by an order of the Subordinate Judge upon her providing security to restore the mesne profits, to the extent of one lac of rupees. The persons who gave that security are or are now represented by the present appellants.

The decision of the Subordinate Judge in favour of the widow was affirmed by the Court of the Judicial Commissioner of Oudh. But on an appeal being presented to His Majesty in Council, the decree was varied, and it was declared that the taluka with its accretions had passed to the defendant, the brother, though the other property left by the deceased would pass according to Hindu law to the widow. It was referred to the Court of the Judicial Commissioner to ascertain, if there was any dispute, how much of the property formed part of the

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1. (1892) L. R. 19 I A 166.
2. (1914) L. R. 41 I. A. 197.
3. (1886) 13 I. A. 134.

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taluka, and how much was the private estate of the deceased which would pass to his widow.

The Court of the Judicial Commissioner remitted the case for enquiry to the Subordinate Judge, and he reported accordingly; and thereupon the Court of the Judicial Commissioner decided by decree dated the 4th March, 1907, that all the villages claimed by the widow except thirty-one belonged to the taluka, and that the suit of the widow must now be dismissed except as to these thirty-one.

Both parties appealed from this decree to His Majesty in Council, but with some variations immaterial to the present purpose the decree was affirmed on the 22nd March 1918. *

There were, of course, some villages which must belong to the taluka, and in fact the widow admitted that 117 villages formed part of the taluka. Possession of them was forthwith given to the respondent, the son of the original defendant, who had by this time died. And on the 21st August, 1908, the Court of the Judicial Commissioner directed that the Order of His Majesty in Council and its own decree of the 4th March, 1907, should be sent to the Subordinate Judge, and ordered him to ascertain the amount of the mesne profits of the 117 villages during the perod that the widow had been in possession of them, but he was not to make any order for payment until the whole case had been decided.

Thereupon, on the 6th January, 1909, the respondent made an application purporting to be under Ss. 47 and 144 of the Civil Procedure Code for fixation of mesne profits and damages. The parties against whom the application was made were the widow and the present appellants, the sureties; and the relief prayed was that they might be declared liable for mesne profits of the 117 villages, the liability of the sureties being limited to one lac only. The widow put in a defence which it is not material to consider. The sureties filed a written statement, in which they denied that the respondent was entitled to the relief claimed, and pleaded the following additional pleas :—

"ADDITIONAL PLEAS.

"20—The so-called judgment debtors Nos. 3 and 4 are not liable for the decree of the Judicial Committee of the Privy Council. Their liability ended with the

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* See (1918) I. L. R. 40 All. 470.

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decree of the Judicial Commissioners, dated the 26th March, 1903, which was in favour of judgment-debtor No. 1.

"21. The liability, if any, of the so-called judgment-debtors Nos. 3 and 4 cannot be determined and enforced in execution proceeding. "

The Subordinate Judge, on the 21st November, 1914, decided that there was due from the widow over three lacs of rupees, and that the sureties were liable to the extent of one lac. From, this decision the sureties appealed, giving as their grounds :—

"1. That the Lower Court ought to have held that the liability of the appellant as a surety ceased as soon as the Court of the Hon'ble Judicial Commissioner of Oudh dismissed the appeal of Thakur Sheo Singh on the 26th March, 1903.

" 2. That the Lower Court has taken a wrong view of the security bond executed by the appellant, and that according to the correct interpretation of the deed the liability was restricted only to the time when the order of the learned Judicial Commissioner was passed on the 26th March, 1903, and for due performance of the said order.

" 3. That it has not been shown by the appellant as to what collections were made by the late Rani Raghubans Kunwar during the said period and for this reason there is no definte amount for which the sureties or anyone of them are liable.

" 4. That the application against the appellant ought to have been dismissed with costs.

On the 20th November, 1916, the Court of the Judicial Commissioner dismissed the appeal with costs. Thereupon the sureties, the present appellants, applied for leave to appeal to His Majesty in Council, giving as their grounds :—

" (1) That on a correct interpretation of the Security Bond, dated the 16th September, 1902, executed by the appellants it should have been held that the liability of the petitioners as sureties ceased on the 26th March 1903, when this Honourable Court dismissed the appeal by Thakur Sheo Singh.

" (2) That the Bond ought to have been construed not only with reference to the order of the Subordinate Judge, but also with reference to the terms of section 546 of the old Code of Civil Procedure corresponding to order XL, rule 6, of the new Code, interpreted in the form of the Security Bond given in it.

" (3) That if the Security Bond in question had not been filed, execution of decree would have been stayed only till the decision of the case by the Honourable Court. After that Rani Raghubans Kunwar would have obtained execution of her decree under the orders of this Honourable Court, which was never stayed, and in respect of which no action was taken under S. 608 of the old Code of Civil Procedure."

Leave was given accordingly.

In their case on appeal before the Board they raised three points : That the appellants had not undertaken any personal liability, but had only charged their estate, that their charge

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only applied to and secured orders passed by the Court of the Judicial Commissioner in deciding the appeal then pending to it, and that the Court had no jurisdiction over them in the present proceedings and no order should have been made against them in these proceedings.

Of these points the first was not specifically raised in either of the Courts below. There is just enough in the general denial of liability and in the general words in the grounds of appeal to make it open to the appellants before their Lordships. It seems probable that the estates charged are so ample that it was hardly worth the while of the sureties to make this point. But as it has been made before their Lordships it must be decided, and in the opinion of their Lordships the true construction of the document is that it is an instrument of charge only and not a bond imposing any personal liability and the decree must be corrected in this respect.

The second point, and that which has been principally fought throughout is whether the appellants became sureties for the restitution of the mesne profits according to the ultimate decision of the Courts, or whether they were only to be liable in the event of the first Court, that of the Judicial Commissioner deciding against them, and not liable if that Court decided in their favour, though the decree was finally reversed in the Privy Council.

Upon this point their Lordships are in agreement with the Subordinate Judge and the Court of the Judicial Commissioner. The other construction would give a strange result. According to it if the Court of the Judicial Commissioner had reversed the decree of the Subordinate Judge, but wrongly reversed it and been itself corrected on final appeal, so that the widow was really entitled to possession and the mesne profits, still the Court of the Judicial Commissioner having decided against her, the sureties would have had to pay to the defendant, who had no title, the amount of the mesne profits from the date of the original decision to that of the intermediate Court of Appeal.

It would be strange indeed if the language of the instrument had been such as to create a kind of wagering contract of

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this nature ; but there is really no difficulty in the language of the instrument. These are its terms :—

> "We are Raj Debi Bakhsh Singh, Raj Raghuban Singh and Raj Mangal Singh.
>
> "Whereas a decree for possession of Taluka Mahewa, etc., has been passed on 6th August, 1902, by the Subordinate Judge of Sitapur, in favour of Rani Raghubans Kunwar, widow of Thakur Balbhaddar Singh, Talukdar of Mahewa, against Thakur Sheo Singh; and whereas, for the purposes of delivering possession in execution proceedings, the said Court of the Subordinate Judge has,under order dated the 21st August, 1902, required the Rani, Plaintiff-Decree-holder, to furnish security in the amount of Rs. 1,00,000, so that any order that might be passed by the Court of the Judicial Commissioner of Oudh be made binding on the surety for the said sum of Rs. 1,00,000; and whereas Thakur Sheo Singh preferred an appeal to the Court of the Judicial Commissioner against the order of the 21st August, 1902, at the end of August, 1902,and it was dismissed on the 12th September, 1902. we, the declarants, furnish security for Rs. 1,00,000, hypothecating the following property therefor, and declare that the hypothecated property shall serve as security, and be liable to the extent of Rs. 1,00,000 for carrying out the aforesaid purpose. Wherefore this security bond has been executed so that it may serve as an authority."

By this instrument the obligors make themselves liable to the amount of one lac as security for any order that might be passed by the Court of the Judicial Commissioner, not the first order but any order ; and the ultimate orders of the Judicial Commissioner were that of March 4th, 1907, decreeing that the claim of the widow be dismissed as to all but a few villages, and that of the 20th November 1916, by which, *inter alia*, the assessment of the Subordinate Judge finding that the mesne profits amounted to more than three lacs of rupees was affirmed. On this point, therefore, the appellants fail.

There remains a matter which has given their Lordships considerable trouble. When this suit began the old Code of Civil Procedure was in force ; but when the application against the widow and the sureties for the recovery of the mesne profits was started the new Code of Civil Procedure of 1908 had come into force and, as already stated, the application purported to be made under Ss. 47 and 144 of that Code.

In the course of the judgments in India Section 145 was referred to ; but whatever might have been its effect if the sureties had been personally liable it has no application now that their Lordships have construed the instrument as giving only a charge upon property ; and indeed the application did not purport to rely upon this section. What, then, is the authority for

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it ? Sections 47 and 144 provide for the decision of questions relating to the execution, discharge or satisfaction of the decree, and for restitution including the payment of mesne profits when a decree has been varied or reversed ; and they enact that any such questions shall be determined in the suit and not by a fresh suit. But these sections apply only to the parties or the representatives of the original parties, and do not apply to sureties. No reliance can, therefore, be placed upon these sections as authorising the inclusion of the sureties as parties to the application made against the widow.

The assessment of damages, however, is one to be made once and for all as between the parties to the suit. The sureties are bound by that assessment and have no right to question it, as was not only admitted but contended by Counsel for the appellants before their Lordships' Board.

It is possible that in an extreme case the Court to which application was made to enforce such an instrument of suretyship, if it thought that there had been no real trial of the amount of the mesne profits might, upon terms, admit the sureties to question the amount, but it would be an extreme case, and no such case is made here. So far, therefore, as the applicant sought to have the assessment determined in the presence of the sureties no harm was done, and indeed the sureties need not have appeared.

But the questions of their liability upon the instrument, whether they were personally liable and whether, in the events which happened it had become applicable, were matters which they were entitled to have determined against them in a regular and authorised manner. The contention for the appellants is that for this purpose there should have been a separate suit to enforce the charge, and that this must have been one according to the procedure provided by Section 90 of the Transfer of Property Act.

In order to see whether this is so their Lordships turn to the instrument itself. For a proceeding under the Transfer of Property Act there must be a mortgagor and a mortgagee. Their Lordships have to examine whether in this case there is any mortgagee, any person to whom the security was given. Now no person is mentioned in the instrument. It recites the decree that the widow has been ordered to furnish security, and then the declarants furnish security by hypothecating their property. The form of an instrument such as this, in the absence of any special form being provided by the Code, and there is no suggestion that there was any such form provided under the Code then in force, must vary according to the practice of the Court. It appears that in the High Court at Calcutta, in instruments of this nature, the parties bind themselves to some named officer of the Court, and that, if the instrument has to be put in suit, either the officer sues or he, under order of the Court, assigns the security to the party who wishes to avail himself of it ; but this instrument does not purport to bind the sureties to any individual officer or to anyone.

It is suggested that they are bound to the Court. But the Court is not a judicial person. It cannot be sued. It cannot take property, and as it cannot take property it cannot assign it. It remains, therefore, that here is an unquestioned liability, and there must be some mode of enforcing it, and that the only mode of enforcing it must be by the Court making an order in the suit upon an application to which the sureties are parties, that the property charged be sold unless before a day named the sureties find the money.

This form of procedure is that to which the High Court of Allahabad gave its sanction in the case of *Janki Kuar* v. *Sarup Rani* and another [1].

The new Code of Civil Procedure, that of 1908, provides a special form of security bond to be given during the pendency of an appeal (Appendix "G," No. 3). The form shows that it is intended to be given to someone and not to be a mere undertaking to the Court. Whether that someone should be the other party or an officer of the Court is not made clear ; but with this form in use it is not likely that the difficulty which surrounds the present case will arise in future,

It appears to their Lordships that the proper way of dealing with the present case is to consider that there are three steps :—

(1) The assessment of the mesne profits to which the sureties need not be parties.

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[1] (1895) I. L. R. 17 All., 99.

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(2) The construction of the instrument determining that the property charged is liable as security in the events which have happened.

(3) The order that the property be sold unless the sureties pay.

It might have been more regular to take the first by itself and without the sureties, and to take the second with the third; but unless it be that there is possibly some increase of costs no harm has been done. It is idle to talk of the proceedings as if they had been taken before a Court which had no jurisdiction ; and no serious objection was raised to the form of procedure ; nor can the appellants point to anything which would show that justice has not been done to them.

In the result, therefore their Lordships think that except as to the matter of the personal liability of the appellants, the decree appealed from is right. The variation which they would propose is as follows:—"That the decree of the Court of the Judicial Commissioner dismissing the appeal from the Subordinate Judge should be set aside, and that instead it should be decreed that the decree of the Subordinate Judge should be varied by striking out the words "the two sureties are liable," and substituting the words " the property hypothecated by the instrument of security of 16th September, 1902, is liable," but otherwise affirmed.

Their Lordships see no reason to disturb the decrees as to costs in either of the Courts in India ; but as the appellants have succeeded to some extent there will be no costs of the appeal to His Majesty in Council. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for Appellants :—*The Solicitor, India Office.*

Solicitors for Respondents :—*T. L. Wilson & Co.,*

A. P. P.

PRIVY COUNCIL.

[PRESENT :—VISCOUNT CAVE, LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.]

[On Appeal from the High Court at Madras.]

N. Varada Pillai and another ... *Appellants**

v.

Jeevarathnammal ... ... *Respondent*

Limitation—Adverse possession—Does adverse possession change its character when the possessor acquires title—Gift — Unregistered document — Documents inadmissible in proof of title—May serve to evidence nature of possession—Possession of co-parceners whether the old English rule applies to co-sharers in a village other than members of a joint family. Transfer of Property Act (Act IV of 1882) S. 123—Indian Limitation Act, 1908 (Act IX of 1908) Schedule I, art. 144.

A petition reciting a gift, and praying that the villages subject of the gift be transferred to the donee's name, though inadmissible to prove title, may be admissible to prove the character of the donee's possession.

Where a person has begun to hold possession adverse to two co-sharers, and before the statutory period of limitation, succeeds to the title of one of the two, his possession continues to be adverse, to the other co-sharer, though he has become jointly interested with the latter.

Semble, that the rule that the possession of one of several co-parceners, joint tenants or tenants-in-common is the possession of all does not apply to shares in an unpartitioned agricultural village in India not holding their shares as members of a joint Hindu family.

Appeal from a decree of the Madras High Court, reversing a decree of the District Court of Chingleput.

The facts of the case are sufficiently stated in their Lordships' judgment. The District Judge of Chingleput held that Alangarammal the widow of Parthasarathi Pillai, took an absolute interest under the latter's will, but that the gift by her to Duraisani, (the respondent's mother) was not proved, as the deed was not registered as required by S. 123 of the Transfer of Property Act 1882. He held that Duraisani's possession had been permissive only and not adverse to her mother Rajammal and her aunt Alangarammal. He found that the plaintiffs appellants were entitled as heirs and that their claim was not barred by limitation. He therefore decreed the suit.

On appeal the learned Judges of the Madras High Court concurred in the other findings of the District Judge but differed from each other as to the nature of Duraisani's possession Sankaran Nair, J., holding that the petition of October 1895 (set out in their Lordships' judgment) was not admissible in evidence to prove the nature of Duraisani's possession and concurring with the District Judge that such possession was not shown to be adverse, while Trotter, J., held that the petition was admissible, that it showed Duraisani's possession to have been adverse, and that the suit was therefore barred by limitation.

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* P. C. Appeal No. 157 of 1917. 12th May and 20th June 1919.

The question whether the petition was admissible in evidence to prove the character of Duraisani's possession was referred to a full Bench (Wallis, C.J., Abdur Rahim, and Seshagiri Iyer, JJ.), which delivered the following opinion : "We think that the petition is not a document requiring registration under S. 17 of the Indian Registration Act. It refers to a gift on October 8, 1895, some days previously, and ……cannot in our opinion be considered as declaring the rights of the parties within the meaning of S. 17. See *Sankharam Krishnaji* v. *Modan Krishnaji* (1881) 5 Bom. 232. It is therefore not rendered inadmissible by S. 49 of the Registration Act."

The appeal then came for disposal before Trotter and Srinivasa Aiyangar, J. J., who dismissed the suit as time barred.

Hence this appeal :

De Gruyther K. C. and *Kenworthy Brown* for the appellants, submitted that on the due construction of Parthasarathy Pillai's Will, his widow Alangarammal took only a life-interest in the moiety in suit and that hence no long possession adverse to her could bar the appellants' title. Even if it were held that Alangarammal took an absolute estate, the gift by her to Duraisani could not be proved : the deed of gift was inadmissible because it was not registered. The petition to the Collector, of October 1895, was inadmissible in evidence under S. 49 of the Registration Act. The Full Bench erred in holding that it did not declare Duraisani's title within S. 17 of the Registration Act. It might be evidence of Duraisani's possession : but having regard to S. 123 of the Transfer of Property Act 1882, it could not be held to prove that she was in possession under a gift. Hence it was no evidence that her possession was adverse. Now was there any other sufficient evidence to that effect? The real test was whether Duraisani had exclusive enjoyment of the profits: this was not proved.

In any case, upon the death of Rajammal in 1901, Durasiani succeeded to Rajammal's moiety under Rajammal's Will. From that time Duraisani and Alangarammal were joint-owners of the mitta ; and even if Duraisani's possession of Alangarammal's moiety had hitherto been adverse, it ceased to be adverse on her becoming joint-owner. Possession is not adverse when it can be referred to a lawful title : *Corea* v. *Appusamy* [1], *Muttunayagam* v. *Brito* [2].

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[1] (1912) L. R. A. C. 230.

[2] (1918) L. R. A. C. 895.

(Their Lordships intimated that they only desired to hear counsel for respondents on this last point).

J. Robertson-Christie, K. C. and *W. Ingram* for respondent : Both the petition and the oral evidence prove that Duraisani was in possession as owner and not by anyone's permission. Time began to run when Duraisani first took possession and it did not cease to run on her becoming owner of Rajammal's half ; that fact did not alter the character of her possession of the other half.

Their Lordship's judgment was delivered (June 20. 1919), by

Viscount Cave.

Viscount Cave.—This ia an appeal by the plaintiffs from a decree of the High Court of Madras, dated the 19th November, 1915, reversing a decree of the District Court of Chingleput dated the 11th August, 1913, and dismissing the suit.

The suit was brought to establish the title of the plaintiffs to a moiety of a *mitta* or estate situated about thirty miles from Madras and known as the mitta of Kariamangalani. The *mitta* at one time belonged to Narayanasami Pillai, an ancestor of the parties, and on his death it passed to his three sons as members of a joint family. In the year 1845 a partition took place, under the terms of which the eldest son relinquished all interest in the *mitta*, which thereupon became vested in the two younger sons, Gopala Krishna Pillai and Parthasarathi Pillai, in equal shares. No question arises as to the share of Gopala Krishna ; but it is material to state that, on his death in the year 1879 his share became vested in his widow, Rajammal, and that he left issue one child only, a daughter named Duraisani.

Parthasarathi died in the year 1867, having made a will upon which a question of construction arises. Clause 3 of the will was in the following terms .—

> " I have given my half share in Kariamangalani Mitta to my wife, Nayar Alangarammal, *alias* Thayarammal, on account of her maintenance and other absolute use. She is at liberty to enjoy the same with powers of alienation by sale, etc."

By clause 4 of the will the testator gave his property (in general terms) to the two infant sons of his eldest brother, who are now represented by their sons, the plaintiffs. The plaintiffs contend that the effect of the will was to vest the moiety in question in the testator's wife, Alangarammal, for her life only, and that on her death (which occurred in the year

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1912) it passed under clause 4 to the plaintiffs; but it was held both in the District Court and in the High Court that clause 3 gave an absolute interest in the moiety to the testator's wife, and that the fourth clause operated upon the remaining property only. Their Lordships agree with this construction of the will; and they accordingly hold that, on the death of Parthasarathi, his moiety of the *mitta* vested in his widow, Alangarammal, absolutety.

But the plaintiffs have an alternative claim. It appears that they were the persons entitled to succeed on the death of Alangarammal to her property not disposed of during her life-time or by her will, and they contend that the moiety in question was in fact undisposed of at the death of Alangarammal, and accordingly vested in them as her heirs. The defendant, on the other hand, contends that in consequence of certain events which happened during the life-time of Alangarammal, the moiety in question passed to Duraisani, and through her to her daughter the defendant, and accordingly that the plaintiffs have no right thereto. These events must now be stated.

On the 10th October, 1895, Rajammal and Alangarammal, who were then the registered owners of the two moieties of the *mitta*, presented a petition to the Collector, whereby, after reciting that they had, on the 8th October, 1895, given away the two villages constituting the *mitta* as *stridhanam* to Duraisani, *alias* Alamelu, they prayed that orders might be passed for transferring the villages into her name. The petition concluded: "The said Alamelu Ammal shall hold and enjoy them with power to alienate them by way of gift, mortgage, sale, etc." Duraisani on the same date also presented a petition to the Collector reciting the gift of the villages to her on the 8th October, 1895, and requesting that they should be transferred into her name. The Collector accordingly, on the 8th May, 1896, registered the *mitta* in the name of Duraisani.

It was not contended before the Board that the above transactions effected a valid gift of the property to Duraisani; for such a gift must, under Section 123 of the Transfer of Property Act, be made by registered deed. Nor, having regard to Section 91 of the Evidence Act, can the recitals in the petitions be used as evidence of a gift having been made. But the defendant's case is that Duraisani, although she may have acquired no legal title under the transactions referred to, in fact took possession of the property when it was transferred into her name and retained such possession until her death in December 1911, after which date it passed to the defendant as her successor, and accordingly that the plaintiffs' claim is barred by upwards of twelve years' adverse possession. The High Court upheld this contention; and their Lordships, after considering the evidence, have arrived at the same conclusion.

There was a considerable body of evidence showing that Duraisani was in possession or receipt of the rents and profits of the *mitta* during the period above referred to. At or about the date of the attempted gift, Duraisani, who until then had lived with her husband in Madras, came to live with her mother and her aunt, Alangarammal, in the neighbourhood of the *mitta*. and thenceforward spent the greater part of the year with them. From the same date all *pattas* were granted and *muchilikas* taken in the name of Duraisani alone; and the property was managed by agents appointed by her, who accounted to her for the rents. It was contended on behalf of the plaintiffs that, assuming Duraisani to have been in actual possession of the land, she held such possession, not in her own right, but as trustee or manager only for her mother and aunt, and accordingly that her possession was not such adverse possession as to give a title under the Limitation Act; and in support of this contention the plaintiffs relied upon the evidence of a former monigar of the estate, who stated that during the life of Rajammal (who died in 1901) he "used to pay collections to her." But the witness in question prefaced his evidence above referred to by the statement that Duraisani "had confidence in Rajammal;" and he stated emphatically that Duraisani was zamindarini from 1896. Having regard to these statements and to the remainder of the evidence in the case, the proper inference appears to be that, if any rents were in fact paid to Rajammal after 1896, they were so paid by the direction of her daughter Duraisani (who lived with her) and in order that they might be applied to the joint household expenses.

The plaintiffs also relied upon the will of Rajammal dated the 2nd April, 1901. By this will the testatrix referred expressly to the petition of the 10 October, 1895, and the subsequent transfer of the two villages into the name of Duraisani, and added: " and the above two villages are being enjoyed by the said Duraisani Ammal." The will then proceeded as follows:—

> "My daughter, the said Alamelu Ammal, *alias* Duraisani Ammal, shall take the above two villages and shall either amicably or through Court recover and take all the following arrears' jewels, etc. due to me, *viz*., the Zamin sircar arrears, due to me in the said villages up to past Fasli 1305 upon account from the tenants of the said villages, etc."

It was held by the District Judge that these words amounted to a devise of the two villages to Duraisani, and accordingly that they afforded evidence that in the view of the testatrix no beneficial gift had been previously made to her, but the High Court held that there was in fact no devise of the villages. In the absence of the original text of the will, which was no doubt seen by the Judges in India, their Lordships are unable to say which construction is correct. But even if the devise included the testatrix' interest in the two villages, it would appear to be reasonably clear that the gift was by way of confirmation only and affords no evidence that Duraisani was a trustee of the property. In any case the recitals contained in the will are strong evidence of the possession of the property by Duraisani.

The plaintiffs also relied upon a draft will which was prepared for Alangarammal just before her death in 1912, but which has been held by the Courts in India not to have been adopted by her as her will. This draft will contained recitals similar to those contained in the will of Rajammal, and these recitals were followed by a gift of the villages to the defendant, who had then succeeded to the estate of Duraisani. It may be doubted whether any valid argument can be founded upon a draft will not signed or adopted by the person for whom it was prepared, but in any case the observations which have been made concerning the will of Rajammal apply to this draft will also.

It should be added that although the petitions of 1895 and the change of names made in the register in consequence of those petitions are not admissible to prove a gift, they may nevertheless be referred to as explaining the nature and character of the possession thenceforth held by Duraisani. In other words, although the petitions and order do not amount to a gift of the land, they lead to the inference that the subsequent receipt of the rents by Duraisani was a receipt in the character of donee and owner of the land, and therefore in her own right and not as trustee or manager for her mother and aunt.

Lastly, the plaintiffs' put forward the contention that on the death of Rajammal in 1901 Duraisani became entitled either under her will or by succession to her moiety of the *mitta*, and accordingly that as from that date possession of the villages must be deemed to have been held by her as part owner and not adversely. This contention was founded upon the English rule of law, which was abrogated by the statute 3 and 4 W. IV. 27, sec. 12 that the possession of one of several co-parceners, joint tenants or tenants in common, is the possession of the others so as to prevent the statutes of limitation from affecting them. Whether this rule is applicable to shares in an unpartitioned agricultural village in India not holding their shares as members of a joint family, it is unnecessary for the purposes of the present case to decide; for upon the facts of the case the rule has no application. The limts of the rule were defined in *Cully* v. *Dōe d, Taylerson* [1] as follows.—

> "Generally speaking one tenant in common cannot maintain an ejectment against another tenant in common, because the possession of one tenant in common is the possession the other, and, to enable the party complaining to maintain an ejetoment, there must be an ouster of the party complaining. But, where the claimant, tenant in common, has not been in the participation of the rents and profits for a considerable length of time, and other circumstances concur, the Judge will direct the jury to take into consideration whether they will presume that there has been an ouster: . . . , and, if the jury find an ouster, then the right of the lessor of the plaintiff to an undivided share will be decided exactly in the same way as if he had brought his ejectment for on entirety."

In the present case, it is plain that during the life of Rajammal the possession of Duraisani was adverse as against both co-owners; and this being so, there is no reason for holding that when on the death of Rajammal she became legally entitled to a moiety of the property, the character of her possession of the other moiety as against Alangarammal was changed. There having been an ouster of Alangarammal before the death of Rajammal, this ouster continued after her death, and the possession of Duraisani was adverse to Alangarammal throughout. This contention therefore also fails.

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[1] 11 Ad. and Ellis.

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For the above reasons and upon a review of the whole of the evidence their Lordships have arrived at the conclusion that the decision of the High Court is right, and that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Chapman Walker and Shephard.*

Solicitor for respondent: *J. Graham Pole.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR JUSTICE AYLING.

Idarapalli Dhanushkotirayudu (dead) and others ... *Appellants.*[*]
(*Plaintiffs.*)

v

Vankayala Venkatarathnam and others ... *Respondents.*
(*Defendants*).

Limitation Act art. 140—*Karnam's emoluments—Possession adverse to office holder—Prescriptive title.*

Dhanushkotirayudu v. Vankayala Venkatatham.

A person in adverse possession of lands annexed to the office of *karnam* for over the statutory period acquires a prescriptive title to the lands as against the holder of the office and his successors. *Jhalandur Thakur v. Jharula Das*[1] distinguished.

Appeal against the decree of the Court of the Additional Temporary Subordinate Judge of Rajahmundry in O. S. No. 14 of 1916 (on remand) (O. S. No. 52 of 1915 on the file of the District Court of Godavari) dated 27th July 1918.

A. Krishnaswami Aiyar, for Appellant.

V. Ramesam, for Respondent.

The Court delivered the following

Abdur Rahim, J.,

Judgments: *Abdur Rahim, J.*—The facts on which this appeal depends are to be found in para 12 of the judgment of the Lower Court. A woman called Seshamma was in possession of items 1, 2, 4, 8 and 9 for about 30 years prior to 1893 and then she alienated the properties to some third persons. The plaintiff's father set up his right as reversioner in respect of these properties and disputed the alienations. In settlement of that dispute, the alienees executed a deed of settlement in 1900 and that deed expressly recites that the claim was made by the plaintiff's father by virtue of his reversionary right. The Subordinate Judge has found that these lands were originally attached to the karnam's office as service inam; but upon the facts which he has stated he came to the conclusion that the lands became disannexed from the office and that therefore the plaintiff's father acquired an absolute right to them subject only to any right of resumption which the Government may have.

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[*] A. S. No. 18 of 1299. 9th December 1919.

[1] (1914) I. L. R. 42 Cal. 244.

The argument of Mr. Krishnaswami Ayyar in the first place is that these lands must be regarded as emoluments of the office of karnam that they could never cease to be as such and that the rules of limitation have no application. In support of this proposition he relies upon a ruling of the Privy Council in *Jalandhar Thakar* v. *Jharula Das* [1]. There the dispute related to the office of Shebait and his right to receive the surplus offerings. Their Lordships held that the offerings could not be disannexed from the office and that art. 144 of the Limitation Act upon the facts found did not apply. There was no question there of the right of acquisition of any immoveable property by persons holding that property for more than 12 years and it is difficult to see any analogy between the facts of that case and those of the present. Mr. Krishnaswami Aiyar also relied on a sentence in the judgment in *Chandrakantam* v. *Subbarayudu* [2]. But there my learned brother found that the possession of the defendant was permissive and stated that even if the possession of the defendant was adverse it would not make any difference. The facts, so far as it can be, gathered, were that the defendants claimed to be in joint possession of certain land along with persons holding an office in connection with a temple. There is nothing in that judgment to support the proposition put forward on behalf of the appellants. Similarly the facts of the case in *Kamalathammal* v. *Krishna Pillai*[3] are altogether different from the facts of the present case and I cannot see that there any claim was set up to the land on the ground of prescription or adverse possession.

On the other hand the ruling in *Neelachalam* v. *Kamaraju* [4] following *Gnana Sambanda Pandara Sannathi* v. *Velu Pandaram* [5]. a decision of the Privy Council makes

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1. (1914) I. L. R. 42 Cal. 244.
2. (1914) 1 L. W. 827 at 830.
3. (1910) 20 L. L. J. 781.
4. (1904) 14 M. L. J. 488.
5. (1899) I. L. R. 23 Mad. 271=10 M. L. J. 29.

Dhanushkotirayudu
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Venkatartham.

Abdur
Rahim, J.,

it perfectly clear that art. 144 and S. 28 of the Limitation Act applies to such a case as this. An earlier decision of this Court in *Papayya* v. *Ramana* 1 is also to the same effect.

It was next argued by Mr. Krishnaswami Aiyar that the Government has a right to treat the land as service inam and that they did in fact so treat it as they afterwards enfranchised the inam by imposing quit rent. We are not concerned in this case with the right of the Government either to enfranchise the land or to impose quit rent. We are dealing in this case with the rights of the parties *inter se* and as between them it would seem to be impossible to hold that, upon the facts as they happened, the property had not become the absolute property of the plaintiffs.

For a large number of years, the property had been enjoyed by persons, who never claimed the office of karnam so far as it appears from the evidence, as ordinarily private property and the plaintiffs acquired the property from such persons under an alienation. The plaintiffs or their father did not acquire the property by virtue of the office of karnam.

This appeal must be dismissed with costs.

Ayling, J :—I agree.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR.

Ramaswami Pillai ... *Petitioner* (*Appellant* Petitioner*).

v.

Badra Nayakkan and others ... *Respondents.*

Ramaswami
Pillai
v.
Badra
Nayakkan.

Pleader—Power to compromise—Unconditional withdrawal of case, if justified.

A vakalat empowering a pleader to compromise a suit or an appeal, does not authorise him to withdraw it unconditionally. The power to withdraw must be specifically given and cannot be implied from an authority to compromise. *Thenal Ammal* v. *Sokkammal* 2, *Basangowda* v *Chanchigiri gowda* 3, Referred to.

Petition under S. 115 of Act V of 1908 and S. 106 of the Government of India Act 1915 praying the High Court to revise the order of the District Court of Ramnad at Madura dated 27th June 1917 in I. A. No. 216 of 1917 in As No 707 of 1915.

C. R. P. No. 597 of 1917 9th January 1920.

1. (1883) I. L. R. 7 M. 85.
2. (1917) I. L. R. 41 M. 233.
3. (1910) I. L. R. 34 B. 408.

K. Raja Aiyar for Petitioner.

K. P. Shunmagam Pillai, E. S. Chidambaram and *P. N. Marthandam* for Respondents.

The Court delivered the following

Judgment :—This is a petition to revise the order of the District Judge of Ramnad refusing to allow the petitioner to conduct his appeal. His allegation was that his vakil has improperly withdrawn the appeal. The reasons given by the District Judge do not commend themselves to me. None the less I would have had no jurisdiction to go into this matter but for the fact that the District Judge ends his order by saying that "the petition does not lie" thereby declining jurisdiction to hear the petition. The allegations contained in the affidavit of the petitioner certainly require investigation. Without asking the vakil concerned for an explanation and without taking further evidence in the case the District Judge disposed of the application on two grounds both of which are unsustainable. The first ground is that the vakalat authorised the vakil to compromise and therefore the vakil was competent to withdraw the appeal. He is clearly wrong here. The power to compromise does not involve a power to withdraw an appeal unconditionally. That power must be given specifically and cannot be implied from the general words authorising the vakil to compromise. *Thenal Ammal* and *Sokkammal* [1] this Court held that the powers to compromise must be very carefully scrutinised. Reference may also be made to *Basan Gowda v. Chanchigiri Gowda.* [2]

The other reason given by the District Judge is equally wrong. He refers to an order made by the District Judge Mr. Moore as if that learned Judge had authorised the withdrawal on the day the case was to be heard. The order of Mr. Moore is "Adjourned to 22-3-1917 at the request of the vakils on both sides. It is stated that this appeal will be withdrawn as the matters in dispute have been compromised." This does not show that without a compromise the vakils promised to withdraw the appeal. It is clear that the present District Judge has misunderstood the terms of the vakalat as well as the terms of the order of Mr. Moore and by misunderstanding these two documents he has declaimed to go into the case by saying that a petition does not lie. Therefore I am entitled under S. 115 to set aside that order. I reverse his order and direct him to enquire into the allegations contained in the affidavit. The District Judge will see that it is in the interests of the legal practitioner concerned that this matter should be set at rest as early as possible before the parties and the pleaders forget what happened on those dates.

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[1] (1917) I. L. R. 41 Mad. 233.

[2] (1910) I. L. R. 34 Bom. 408.

With these remarks I send back the case to the District Judge with directions to retake the case on his file and dispose of it according to law: Costs will abide.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE OLDFIELD AND MR. JUSTICE SESHAGIRI AIYAR.

M. R. M. V. L. Firm of Madura represented by managing member Sokkalingam Chetty. ... *Appellant** (*Defendant*)

v.

P.S. Krishnaswami Ayyar. ... *Respondent* (*Plaintiff.*)

Limitation Act art. 29 and 36—Applicability of—Attachment before Judgment—Suit for damages—Limitation.

Art. 29 of the Limitation Act is not restricted in its application to cases in which the seizure is intrinsically wrongful, as for instance when it is made without jurisdiction. It applies also to a case where the foundation of the claim is that the defendant procured the seizure of the plaintiff's property under a perfectly legal process, but by misrepresentations to the Court. *Manavikrama* v *Avisalam Koya*[1] Relied on.

Appeal against the order of remand of the Distrist Court of Trichinopoly dated the 1st day of November 1918 in Appeal Suit No. 554 of 1917 preferred against the decree of the Court of the District Munsif of Ariyalur in Original Suit No. 76 of 1917.

C. V. Anantakrishna Aiyar for Appellants.

P. Nagabhushanam for respondents.

The Court delivered the following

Judgment:—In this Court the appeal has been based *interalia* on the ground that in view of the result of plaintiff's claim to damages in prior proceedings the suit, whether in time or not must fail. Unfortunately the appeal was not resisted in the Lower Appellate Court on this ground. But that is no obstacle to its being taken here. We propose to deal with it at once and therefore call on the Lower Appellate Court to submit a finding on the evidence on record on the second issue framed by the District Munsif.

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*A. A. O. No. 15 of 1919. 16th December 1919.

[1] (1895) I. L. R. 19 M. 80.

Finding will be returned within one month after the re-opening of the Lower Appellate Court. Seven days are allowed for filing objections.

[In compliance with the order contained in the above judgment, the District Judge of Trichinopoly submitted the following finding :—"I have therefore no hesitation in agreeing with the District Munsif and in finding that the order making the attachment absolute in O. S. No. 558 of 1914 on the file of the District Munsif's Court of Madura does not operate in any manner as a bar to this suit either under Section 95 of the Code of Civil Procedure or by any rule of *res judicata*."]

C. V. Anantakrishna Aiyar, for appellant.

P. Nagabushanam, for Respondent.

The Court delivered the following

Judgment :—We accept the finding that plaintiff's claim to damages in the prior proceedings does not disable him from suing. It is a sufficient reason for doing so that the claim was not made, as S. 95 C. P. C., requires, at the stage at which either of the conditions postulated by that section had been fulfilled, but in an anomalous manner not contemplated by law in an application at the close of plaintiff's counter-affidavit disputing the propriety of the attachment before judgment and therefore at a stage at which the Court was not called on to deal with it and could not legally have done so.

The appeal is then argued with reference to limitation, plaintiff contending for the application of Article 36 or 49, Schedule I, Limitation Act and defendant for Article No. 29. In the lower courts it does not seem to have been noticed that damages were claimed under two headings, firstly on account of injury to plaintiff's stock in trade caused by the persons, who made the attachment before judgment treading on it and secondly on account of the sale of the goods attached by the Court at a low price and the injury to his trade and reputation consequent on the attachment itself. The former cause of action is clearly covered by Article No. 36 and only the latter calls for further discussion. Article 49 may be dismissed from consideration at once, since this portion of the suit is not for specific moveable property or compensation for its conversion or for injury to it inflicted by the defendant.

The foundation of the claim is in fact that defendant procured a seizure of the property under a perfectly legal process, but by misrepresentations to the Court;and the question is whether this seizure should be regarded as wrongful, because it was obtained by misrepresentation, and Article No. 29 should be applied or whether the misrepresentation should be regarded as the tort complained of with reference to Article No. 36, Article No. 29 being restricted to cases, in which the seizure is intrinsically wrongful, as for instance when it is made without jurisdiction. The Lower Appellate Court has taken the former view, relying on *Manavikraman* v. *Avisilan Koya* [1], and that case has never been overruled and was distinguished in the first of the series of cases relied on by defendant on the ground indicated above. In each of these cases, *Murugesa Mudaliar* v. *Jaitaram Davey* [2], *Multan Chand Kanyalal* v. *Bank of Madras* [3], *Narasimha Rao* v. *Ganga Raju* [4], *Pandiri Veeranna* v. *Mandavilli Subba Row* [5] and *Ram Narain* v. *Umrao Singh* [6] the plaintiff, whose property was in question, was a stranger to the proceedings, in which the legal process had issued, and, if they contain some expressions consistent with the present defendant's contention, that may be because the argument did not relaté to it, but to other points, such as the meaning of "seizure" or the date on which the cause of action under Article 29 arose. Reference has also been made to *Madras Steam Navigation Company Ld.* v. *Shalimar Works Ld.* [7], but the portion of the judgment dealing with limitation was *obiter* and proceeded, it is to be presumed, on the plaint allegation that the seizure was made without jurisdiction. In

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[1] (1895) I. L. R. 19 Mad. 90.

[2] (1900) I. L. R. 23 Mad 621.

[3] (1904) I. L. R. 27 Mad. 346.

[4] (1908) I. L. R. 31. Mad 481.

[5] (1916) 31. M. L. J. 257.

[6] (1907) I. L. R. 29. All. 615,

[7] (1915) I. L. R. 42 Cal 85.

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Ayyar.

these circumstances there is no reason for regarding the authority of *Manavikrama* v. *Avisilan Koya* [1] as impaired or for dissent from the Lower Appellate Court's decision.

The Appeal Against Order is dismissed, except as regards the claim to damages on account of injury to plaintiff's stock in trade in the course of the attachment. As regards it the appeal is allowed, the decision of the lower Courts being set aside and the suit being remanded to the District Munsif for re-admission and disposal with reference to this part of the claim in the light of the foregoing. The District Munsif will provide for costs in all Courts, which should follow the result of each part of the claim, in his decree.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE KRISHNAN.

Gokarakonda Narasimha Rao ... *Appellant** (*Plaintiff*)
v.
Gokarakonda Pappanna and others... *Respondents* (*Defendants.*)

Narasimha
Rao
v.
Pappanna.

Registration Act, Ss. 28,29 and 31—Sale—Inclusion of property not intended to be conveyed, for registration in a particular district—Registration if valid—Suit to set aside sale—Limitation.

In a sale-deed intended to convey properties situated within the registration district of M., the parties included a very small item of property which neither the vendor intended to sell nor the purchaser to buy ; and it appeared that this was done in order to effect registration of the sale-deed in another registration district wherein the small item was situate. *Held* that the action of the parties amounted to a fraud on the registration law and the sale-deed was not duly registered so as to affect any of the properties sought to be conveyed.

The sale in question being totally inoperative, did not require to be set aside within the period prescribed by art. 44 of the Limitation Act.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry in A. S. No. 180 of 1917, (A. S. No. 273 of 1917 on the file of the District Court, Godavari) preferred against the decree of the Court of the First Additional District Munsif of Rajahmundry in O. S. No. 344 of 1916, (O. S. No. 482 of 1916 on the file of the Court of the District Munsif of Amalapur).

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*S. A. No. 1522 of 1918. 8th December, 1919.

[1] (1895) I. L. R. 19 Mad. 80.

N. Rama Rau, for Appellant.

P. Narayanamurthi, for Respondent.

The Court delivered the following.

Judgment :—The objection to the sale under S. 21 of the Registration Act based on the vagueness of description of the property sold (see paragraph 4 of the Appellate Court's judgment) is not sustainable. On the question of the validity of the registration of the deed, the Temporary Subordinate Judge's judgment has been so expressed that we are unable to discover whether he meant that in his opinion the parties did or did not intend that property in the one cent. of land in Survey No. 236-2 should pass by the sale-deed.

In the first part of paragraph 5, the Subordinate Judge says "it does appear that the parties did not really intend to sell or to purchase the said one cent. of land." Later on he says that "it cannot be said that it is so patent that the parties intended that the property should not pass in the one cent."

Finally he concludes this paragraph by finding the 1st point in the affirmative, that point being itself worded in a negative form.

We call on the present Subordinate Judge of the Temporary Court to return a fresh finding on the 9th issue in the suit on the evidence on record within six weeks. Seven days will be allowed for filing objections.

[In compliance with the order contained in the above judgment, the Temporary Subordinate Judge of Rajahmundry submitted the finding "the parties to the sale not having intended that property in the 1 cent. should be affected by the sale, the inclusion thereof in the sale-deed was a fictitions entry in fraud of registration law" and "that the sale-deed is not valid for want of proper registration."]

The Court delivered the following

Judgment :— We must accept the finding of the Subordinate Judge that the one cent. of land in Amalapur was included in the sale-deed Exhibit A purely for the purpose of getting the deed registered by the Sub-Registrar of that place without any intention of passing title in it to the vendee. That finding is supported by the evidence and no valid objection has been urged against it. On that finding we must hold following the case in *Rama Naik* v. *Nagamuthu Nachiar*, 1 that the present case falls within the principle enunciated by the Privy Council in *Harendra Lal Roy Chowdhuri* v. *Hari Dasi Debi* 2. The action of the parties in this case was a fraud on the registration law. The fact that there was land corresponding to the one cent. included in the deed, belonging to the vendor is not sufficient to take it out of that principle as the finding is that it was not intended that the deed should affect the land in any way.

On this view the sale-deed, Exhibit A, must be taken to have not been properly registered; and the title to A Schedule properties was therefore not validly conveyed to the 8th defendant.

The next question is as to limitation. Article 44 does not apply as there was no sale at all in law to be set aside. See *Narayanan* v. *Lakshman* 3 and *Petherperumal Chetty* v. *Muniandy Servai* 4. The article really applicable is article 144 but the period required for it has not expired yet. There is thus no bar by limitation.

Plaintiff is therefore entitled to have the A Schedule properties also included in the partition. But as pointed out by the respondent's Vakil the sum of rupees 6,000, the consideration for Exhibit A, was utilised to pay off a mortgage and for other purposes binding on the estate. This was found by the Munsif and the point was not controverted in the Lower Appellate Court as the Subordinate Judge notes. We think an equity arises in favour of the 8th defendant against the plaintiff on that finding which we adopt, that on the sale to him being invalidated the plaintiff should pay him a proportionate share of the moneys so utilised, *viz.*, of the sum of rupees 6,000.

This second appeal must be allowed and the decree of the Lower Appellate Court must be modified as stated above. Each party will bear costs throughout with regard to A schedule properties.

A. V. V.

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1. (1917) 42 I. C. 315,=22 M. L. T. 516.
2. (1914) I. L. R. 41 C. 972.
3. I. L. R. 39 M. 456.
4. (1908) I. L. R. 35 C. 551.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE KRISHNAN.—

Rajangam Aiyar	...	*Appellant* (Defendant in O. S. No. 1 of 1918 on the file of the District Court of Tinnevelly.)*
v.		
Rajangamier minor by guardian Sankarama Ayyar	...	*Respondent (2nd Plaintiff in do.)*

Rajangam Aiyar
v.
Rajangam Aiyar.

Stamp Act, (II of 1899)—*S.* 2 (15) *Art* 45. *Sch. I* (*a*) *art.* 5 (*c*)—*Applicability Partition Instrument—What is—Stamp duty on.*

Where, by a document, termed a yadast or agreement, executed at Trivandrum in Andu 1090 corresponding to the year 1915 by one Krishnaiyar and his brother, and bearing a Travancore adhesive stamp of one anna, the brothers divided their properties situated both in British and Travancore territories, and the deed provided that the partition was to take effect from the date of execution of the document and the properties were to be enjoyed separately with effect from the 1st Thai of Andu 1090 corresponding to 14th January, 1915, and that separate partition deeds should be executed for the properties in Travancore and British India and the document should remain in force till then, *held* that, under the definition in S. 2 (15) of the Indian Stamp Act, 1899, the deed was chargeable as a contract of partition under art. 45.

* Case stated under S. 61 (1) Act 11 of 1899 by the Collector of Tinnevelly in original suit No. 1 of 1918 on the file of the District Court of Tinnevelly.

The Collector's letter of reference was as folfows.

At the instance of the Revenue Divisional officer Tinnevelly, I have the honour to refer the following case for the orders of the High Court under S. 61 (1) of the Indian Stamp Act 2 of 1899.

The District Judge, Tinnevelly, in the course of the trial of O. S. No. 1 of 1919 on his file admitted in evidence under section 35 of the Stamp Act, an unstamped document (copy enclosed with a translation) after levying a stamp of 8 annas and a penalty of Rs. 5, under Article 5 (c) of Schedule 1 (a). The document which is termed a yadast or agreement was executed at Trivandram in Andu 1090 corresponding to the year 1915, by one Krishna Aiyar and his brother Subramaniya Aiyar. It bears a Travancore

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* Referred Case No. 2 of 1919. 29th January, 1920.

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adhesive stamp of one anna. By means of this document the brothers, divided their properties situated both in British and Travancore territories. The partition was to take effect from the date of execution of the document and the properties were to be enjoyed separately with effect from the 1st Thai of Andu 1090 corresponding to the 14th January 1915. It is also stipulated that separate partition-deeds should be executed for the properties in Travancore and British India and that till then this document should remain in force.

3. The Revenue Divisional officer is of opinion that the document is not a Yadast or agreement but an instrument of partition under Article 45 of Schedule 1 (a) as defined by section 2 (15) of the stamp Act. I agree with him.

4. If the document is declared to be a deed of partition the stamp duty will depend on the value of the separated share, specified in schedule 2 of the docunent, which consists of immoveable properly valued at Rs. 71,500- situated in British India and also in Travancore. As the bulk of the property situated in British India and also in Travancore consists of lands paying assessment and as their value for the purpose of stamp duty has to be calculated at not more than five times the annual assessment, I am asking the Revenue Divisional Officer to ascertain and report the annual assessment of these lands. I shall submit a further report on assessment of these lands, on receipt of the information.

5. Pending the disposal of this reference the Revenue Divisional Officer has requested the District Judge not to deliver the original document to the parties.

Yadast executed by Krishna Aiyar and his brother Subramania Aiyar sons of Rajangam Aiyar, Lakshmipuram Street, Fort Trivandram in the presence of (1) Subbiar son of Rama Aiyar formerly of Mukkani Village in the Srivaikuntam Taluk now residing in South Street, Trivandram Fort and (2) Subramania Pillai, son of Shanmugam Pillai of Sengalaseri Vanjiyur, Trivandram whereby we have amicably divided our whole property allotting the property in Schedule 2 to Subramania Aiyar and we have resolved to enjoy from to day individually and severally the property fallen to our respective shares

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and the income thereof from 1st of Thai of current Andu and each should collect the arrears of rent, if any, and Krishna Aiyar should make good any rents already in the rents collected in advance for the shops now fallen to Subramania Aiyar's share and that we should execute in these terms and register a partition deed here and in Tinnevelly and till then this should remain in force and that each should severally enjoy the moveable property which he now individually possesses and each should have a copy of this Yadast signed by both and Krishna Aiyar should take charge of the chit dealing and other property not mentioned in the schedules and that Subramania Aiyar should have no concern with these things and that the liabilities of Subramania Aiyar would not bind Krishna Aiyar and we have agreed that neither of us has the power to cancel this.

We have agreed that Krishna Aiyar should have the property mentioned in schedule I consisting of property worth Rs. 48,200 by virtue of his being the elder brother and Rs. 71,500 the value of his half share and that Subramania Aiyar should have the property mentioned in schedule 2 worth about Rs. 71,500/-

T. R. Ramachandra Ayyar and *N. A. Krishna Aiyar,* for the Appellant.

C. V. Ananthakrishna Aiyar and *V. Narayana Aiyar,* for the Respondents.

The Court delivered the following.

Judgment :—We think that under the definition in S. 2 (15) of the Indian Stamp Act 1899 this deed is chargeable as a contract of partition under article 45, and we determine that it is chargeable with a 15 rupee stamp.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE COUTTS TROTTER.

King Emperor ... *Appellant** (*Complainant*)

v.

Messrs. A. M. Hussain Ally & Co., *Respondent.*
and others.

King Emperor *v.* Hussain Ally & Co.

Indian Income Tax Act, (VII of 1918)—*Ss.* 24 *Proviso* 2; 39 (*d*) *and* 40—*Scope and Applicability—Penal Assessment—Order for—Subsequent prosecution under S.* 39 (*d*)—*Maintainability—S.* 24 *Proviso.* (2)—*Effect.*

Held, that a prosecution of an assessee under S. 39 (d) of the Act for failure to produce his account books in obedience to a notice issued to that effect was not barred by proviso 2 to S. 24 of the Act by reason of a prior order for penal assessment made against him by the Collector under S. 24 of the Act on the ground that he had made a false return, even though, in making the order under S. 24 the Collector treated the non-production of account books by the assessee as evidence of the falsity of his return.

The proviso to S. 24 is intended to bar a prosecution under S. 40 of the Act, not one under S. 39.

The only ground on which the Collector can direct a penal assessment under S. 24 of the Act is that the assessee has made a false return; the Collector cannot do so on the ground of non-production of account books by the assessee.

Appeal against the order of the 4th Presidency Magistrate, George Town.

The Crown Prosecutor, for the Government.

S. Rangasamy Aiyangar, for the Respondents.

The Court delivered the following

Ayling J,

Judgments :—*Ayling, J.*—The accused in this case were prosecuted for an offence under S. 39 (d) of the Indian Income Tax Act for failure to produce their accounts in obedience to a notice issued by the Collector of Madras.

They have been acquitted by the 4th Presidency Magistrate on the sole ground that the prosecution is barred by the second proviso to S. 24 of the same Act, which runs thus : "provided further that no prosecution for an offence against this act shall be instituted in respect of the same facts on which a penal assessment is made under this section."

The only question for our decision is whether the Magistrate has rightly interpreted the section as barring the prosecution in this case.

In my opinion he was clearly wrong. Exhibit VIII of 21st March 1919 is the order imposing penal assessment on the accused. It does not state the facts on which it was based but these must be deduced from the Collector's previous letter Exhibit V of 13th March 1919 which runs as follows :—

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* Cr. A. No. 650 of 1919. 27th January, 1920.

"In your D return dated the 12th August 1918, you showed your income for 1917-1918 as Rs. 18,836-12-0 but you did not produce your accounts before the special Income-tax officer when he called upon you to do so. On the best information that I could secure I have estimated your income at Rs. 60,000 and have assessed you on that figure. I have thus reason to suppose that you have deliberately returned your income at less than its real amount. I hereby require you under S. 24 of Act VII of 1918 to appear before me at 12 noon on the 19th March 1919 with a written statement showing cause why you should not be required to pay penal assessment at a rate exceeding double the rate that would otherwise have been payable on the difference between the income of Rs. 18, 836-12-0 shown in your return and Rs. 60,000 on which I have assessed you to income-tax for 1918-1919."

Now it is perfectly true that the accused's failure to produce their accounts is set out in the letter, and was, as the Magistrate says, a fact before the Collector at the time he wrote this letter and when he levied the penal assessment. But it is equally clear that this was not the fact on which the assessment was made. The letter begins by reciting that accused had returned their income at Rs. 18,000 odd. It then adds (1) that they have failed to produce their accounts in support of their return and (2) that the Collector's independent enquiries disclose the fact that their real income was Rs. 60,000. The Collector then proceeds. "I have thus reason to suppose that you have deliberately returned your income at less than its real amount" and on this calls on them to show cause why they should not be required to pay penal assessment. The failure to produce accounts may have been one reason why the Collector preferred the result of his own enquiries to the assessee's return ; but it is the falsity of the return not the failure to produce the accounts which is the fact on which the penal assessment is made.

Indeed S. 24 makes it clear that it is only a return of income below its real amount which could be the basis of an order for penal assessment. The Collector has to be satisfied that the assessee has returned his income below its real amount either by concealing particulars of it or deliberately furnishing inaccurate particulars.

The proviso though couched in general terms appears to be intended to bar a prosecution under S. 40 of the Act not one under S. 39 which deals with omissions of a totally distinct nature to the act with which S. 24 is concerned.

1 would set aside the Magistrate's order and direct him to restore the case to file and dispose of it according to law.

Coutts Trotter, J.

Coutts Trotter, J, :— I agree ; but as the case is of some public importance I will state my reasons in my own words. The Respondents were prosecuted before the 4th Presidency Magistrate under the Indian Income Tax Act (VII of 1918). He acquitted the accused on the view that the Second proviso to S. 24 of the Act barred the prosecution. Government appeals against the acquittal.

The facts can be stated very briefly. The respondents are a firm carrying on business in Madras and they were called upon in the ordinary way by the Collector to furnish a return of their income for purposes of assessment for income-tax. On the 12th August 1918 they furnished a return showing an income of Rs. 18, 836-12-0. The Collector was not satisfied of the truth of the return and on 4th February 1919, notice was given to the respondents to produce their account books under S. 18 of the Act. This notice and a subsequent one calling upon the firm to show cause why they should not be prosecuted under S. 39 (d) of the Act were disregarded and the books were not produced. The case of the respondents as to that on the merits is that the books required for production were in the hands of partners out of Madras who could not be communicated with in time. That defence will of course be open to them hereafter.

The Collector had meanwhile given the respondents notice by a letter of 12th March 1919 that he disbelieved the truth of their return and had estimated their income at Rs. 60,000 and that he called upon them to show cause on 19th March why they should not pay a penal assessment on the sum between the figure returned and that found by the Collector to be the true one. On the 21st March he passed against the firm an order levying a penal assessment of two annas in the rupee on the difference between the actual return of Rs. 18,836-12-0 and what he held to be the true figure of Rs. 60,000. This he is empowered to do by S. 24 of the Act and no question arises as to it before us.

Meanwhile he had on the 12th March issued proceedings directing the prosecution of the respondents for failure to produce their books a power vested in him by S. 41 of the Act. This is the case that has been dismissed by the Magistrate on a ground of law and that is the sole matter that is before us.

The Penal section is quite clear. (S. 39) " If a person fails without reasonable cause or excuse (d) to produce on or before the date mentioned in a notice under S. 18" (which was admittedly duly given) " such accounts and documents as are referred to in the notice, he shall be punishable with a fine."

But it is said that these proceedings are barred by the fact that the respondents have already been punished under S. 24 of the Act by the Penal assessment made on the 21st March. S. 24 enables the Collector to make such an assessment in cases where he finds that the assessee has concealed particulars of his income or has deliberately furnished inaccurate particulars of such income and has thereby returned it below its real amount. Then follows this Proviso " Provided that no prosecution for an offence against this act shall be instituted in respect of the same facts on which a penal assessment is made under this section. "

The case for the respondents is that it is sought to punish them doubly by a penal assessment and a prosecution *on the same facts* and the learned Presidency Magistrate gave effect to that contention. He was clearly led to do so on his view that the Collector's letter, of the 12th March 1919 (Ex. V) treated the withholding of the books as a reason for the penal assessment which he then threatened. I think this view is wholly fallacious. The Collector directed a penal assessment on the only ground open to him under the Act : *viz.*, that the respondent had made a false return. He had three considerations

King Emperor v. Hussain Ally & Co.

Coutts Trotter, J.

which led him to that conclusion and has clearly indicated them in his letter Ex. V. They had returned a figure of Rs. 18,836-12-0, he had information that their true income was Rs.60,000 and they had not produced their books which would have established their case if it was a true one. The last fact was merely based as evidence of the falsity of their return : they were not and could not have been penally assessed for non-production of their books. This prosecution is not for a false return of income ; they could have been prosecuted for that offence under S. 40 of the Act and then a previous penal assessment would doubtless have been a bar. But they are now prosecuted on a definite allegation of withholding books which is at most a step to aid a false return to get through ; it is not even a necessary step, because a man may make a false return who has no books either to produce or to withhold. Conversely a man might withhold his books and render himself liable to punishment under S. 39 without taking the further step of sending in a false return. I conceive the policy of the Statute to be to provide by S. 39 a punishment for any of the steps likely to be adopted by a fraudulent assessee to impede the Collector in a just estimate of his true income and to provide an alternative remedy of punishment under S. 40 or penal assessment under S. 24 for an actual false return. If he commits one of the former offences he may be punished for it though he does not commit the latter: if he commits the latter he may be punished for it in one of two ways and one only. But if he commits both he may be separately punished for each. Perhaps the clearest way to put it is by an illustration. Suppose a man to have committed an offence under S. 39 by withholding his books and to have been prosecuted and convicted for it before he made a return of his income as he clearly might be. Suppose that subsequently he returns his income at a figure found to be false : could anyone maintain that his conviction under S. 39 was a bar either to his being penally assessed under S. 24 or convicted under S. 40.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE MOORE.

P. L. P. L. Palaniappa Chetti ... *Appellant** (*Petitioner.*)

v.

V. S. S. P. Subramania Chetti and others ... *Respondents* (*Respondents L. R. of the deceased Respondent*).

Palaniappa Chetty *v.* Subramania Chetty.

Provincial Insolvency Act—Ss. 43, 46—Creditor's application under S. 43—Dismissal—Appeal against order of—Maintainability—"Person aggrieved"—meaning.

Under S. 43 of the Provincial Insolvency Act, a creditor has no right to set the Court in motion.

Where a creditor, whose application under S. 43 was dismissed, presented an appeal against the order dismissing his application, *held* that he was not "a person aggrieved" within the meaning of S. 46 of the Act, and that his appeal was incompetent.

Iyappa Nainar v. Manicka Asari [1] and *Ladu Ram* v. *Mahabir Prasad* [2] followed. Meaning of "person aggrieved" in *Exparte Sidebottam* [3] adopted.

Appeal against the order of the District Court of Ramnad. dated the 5th September 1917 in Interlocutory Application No. 165 of 1917 in Insolvency Petition No. 37 of 1914 on the file of the Court of the Official Receiver of Ramnad (Insolvency Petition No. 15 of 1914 on the file of the said District Court of Ramnad.)

M. Patanjali Sastri, for Appellants.

A. Krishnaswami Aiyar with *S. Muthiah Mudaliar, T. M. Ramaswami Aiyar* and *K. Raja Aiyar,* for Respondents.

The Court delivered the following

Judgment :—This is an appeal against the order of the District Judge of Ramnad dismissing an application presented by the appellant before us under S. 43 of the Provincial Insolvency Act.

A preliminary objection was taken by Mr. Krishnaswami Aiyar that the appellant is not a "person 'aggrieved' within the meaning of S. 46 of the Provincial Insolvency Act and therefore that this appeal does not lie. He cited *Iyappa Nainar* v. *Manicka Asari*[1] which is a decision directly in point. Some of the reasons given by the learned Judges in that case

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* A. A. O. No. 1 of 1918. 16th September 1919.

[1] (1917) I. L. R. 40 Mad. 630.

[2] (1916) I. L. R. 39 All. 171.

[3] (1880) 14 Ch. D. 458.

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Subramania Chetty.

do not commend themselves to us, but we think that the conclusion of the learned Judges is right. S. 43 of the Provincial Insolvency Act which enables the Court to call upon the insolvent to produce his books and to give inventories of his properties etc., was intended to facilitate the work of the Court in finally adjudicating upon the extent of the properties which are to be distributed among the various creditors. By the failure of the insolvent to produce his books etc., it is the Court that is aggrieved. It is true, as was contended by Mr. Patanjali Sastri, that the creditor is undoubtedly interested in seeing that the books are produced and that the proper inventory is taken. That is the reason why he is given the privilege of setting the Court in motion. If the language of S. 13 is compared with that of S. 43 to which Mr. Krishnaswami Aiyar drew our attention the position is fairly clear. The language of S. 13 is "the Court may either of its own motion or on the application of any creditor, make one or more of the following orders" etc., there is no corresponding provision in S. 43 which entitles the creditor to set the Court in motion. No doubt, ordinarily, the Court which has other duties to perform, should not be expected to *suo motu* make enquiries of the kind mentioned in S. 43. On that account, the Court would avail itself of any assistance that may be given to it by the creditor who brings to its notice the delinquencies of the debtor but that would not give a right to the creditor to say that the debtor must be committed to jail and that by not sending him to jail, he is in any way aggrieved. We think that as was pointed out in *Tiruvenkatachariar* v. *Tangiyammal* [1] and in *Alagappa Chettiyar* v. *Naganatha Mudaliar* [2] the correct definition of the expression "person aggrieved" is that given in *Exparte Sidebottam : In re Sidebottam* [3]. Mr. Patanjali Sastri contended that in the present case the creditor whose application was refused would come within the definition as given by Lord Justice James. He particularly drew our attention to this language in that definition, namely a person who has suffered a legal grievance or who has been wrongfully refused something. The word "wrongfully" indicates that the there is a right which has been violated; and as we pointed out at the outset a creditor has no right to set the Court in motion although the Court may avail itself of the assistance which he may render. We are in agreement with the statement of the law as laid down in *Ladu Ram* v. *Mahabir Prasad* [1] wherein it is pointed out that the duties imposed by the provisions contained in S. 43 are of a disciplinary character and that the person, if any, who is really aggrieved is the *court* to whom proper assistance has not been rendered by the debtor and *not any person* who sets the Court in motion. We express no opinion on the merits of this case as the matter has not been argued before us.

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[1] (1915) I. L. R. 39 Mad. 479.
[2] (1917) 33 M. L. J 612.
[3] (1880). 14 Ch. D. 458.

The preliminary objection that there is no appeal to this Court must be upheld and the appeal rejected with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE KRISHNAN.

T. Aminudeen Sahib	... *Petitioner** (*6th Respondent in Appeal No.* 176 *of* 1919.)
v.	
Pyari Bai and another minor by Guardian Mahomed Azuz Badsha Singh	... *Respondent* (*Appellant.*)

Aminudeen Sahib
v.
Pyari Bai.

Limitation Act, S. 12 (2)—*Time requisite for obtaining copy of decree appealed from—Meaning—Appeal with copy of decree obtained by another party—Appellant if entitled to a deduction under the section.*

Where it appeared that the appellant in an appeal preferred to the High Court applied within the prescribed period for a copy of the decree appealed against but allowed the application to be dismissed for non-payment of the copying charges and subsequently filed the appeal together with a copy of the decree which had been obtained by another party, *held* that the appellant was entitled under S. 12 (2) of the Limitation Act to a deduction of the time taken in obtaining such a copy.

Ramamurthi Aiyar v. *Subramania Aiyar*, 12 M. L. J. 385 Not. Foll.

Ram Kishan Shastari v. *Kashi Bai* 29 A. 264 Foll.

There are no grounds for importing into S. 12 the restriction that the copy of the decree must have been obtained on the application of the appellant himself

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* C. M. P. No. 187 of 1920. 28th January 1920.

[1] (1916) I. L. R. 39 All. 171.

Aminudeen Sahib
v.
Pyari Bai

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to dismiss with costs Appeal No. 176 of 1919 preferred to the High Court against the decree of the Court of the Temporary Subordinate Judge of Vellore in O. S. No. 18 of 1917 (O. S. No. 45 of 1916 of the file of the Sub-Court North Arcot).

L. A. Govindaraghava Aiyar for *T. Narasimha Aiyangar* and *A. Visvanatha Aiyar* for Petitioner.

G. Krishnaswami Aiyar, for Respondents.

The Court made the following

Order :— This case raises a question as to the meaning of the words " time requisite for obtaining a copy of the decree appealed from " in S. 12 (2) of the Limitation Act which provided for the exclusion of time in computing the period of limitation prescribed for the appeal. The appellant in this applied within the prescribed period for a copy of the decree but allowed the aplication to be dismissed for non-payment of the copying charges. He subsequently filed the appeal together with a copy of the decree which had been obtained by another party, and claimed a deduction under the section, of the time taken in obtaining such a copy. It was held in *Ramamurthi Aiyar* v. *Subramania Aiyar* [1] that he was not entitled to the deduction but the Allahabad High Court in *Ramakistan Shastari* v. *Kasti Bai* [2] dissented from this ruling for which no reasons are given and we are unable to follow it. As has often been pointed out this and other sections of the Limitation Act must be read together with the corresponding provisions of the Code of Civil Procedure. If we so read them it is clear that the copy of the decree appealed from which is mentioned in the section, is the copy of the decree appealed from which has to accompany the memorandum of Appeal under O. 41 R. 1 (formerly S. 541) C. P. Code. The Code does not require that the copy of the decree accompanying the memorandum should have been obtained on the application of the appellant himself and there are no grounds for importing this restriction into S. 12 of the Limitation Act. The appellant was in order

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[1] (1902) 12 M. L. J. 385.
[2] (1907) I. L. R. 29 All. 264.

Aminudeen Sahib v Pyari Bai.

when he presented a copy obtained by another party with his memorandum and was entitled under the section to the deduction claimed. We must therefore overrule the objection that the appeal is out of time.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, AND MR. JUSTICE SADASIVA AIYAR.

Sri Gadadharadoss Bavaji Mahant of Balaji Mutt ... *Appellant.** (*3rd Defendant.*)

v.

Suryanarayana Patnaik, and others ... *Respondents.* (*Plaintiff and Defendants* 1 *and* 2)

Sri Gadadharadoss Bavaji v. Suryanarayana Patnaik.

Madras Estates Land Act (1 *of* 1908) *Applicability—Inam situated in permanently settled estate and consisting of part of Village—Owner of such inam if landholder within the meaning of S.* 3 *Cl.* (5) *of Act—Applicability of Act as between him and his tenants.—Post settlement inam grant—Rights of grantee to both warams—Presumption.*

The presumption laid down by the Privy Council that a grant to an inamdar is a grant of the proprietary rights in the land granted including the Kudivaram as well as the Melvaram interest applied to a post-settlement inam grant.

The Chief Justice (*Sadasiva Aiyar, J. dissenting*) .—

It was not the intention of the legislature to apply the provisions of the Madras Estates land Act as between an inamdar and his tenants where the land is situated in a permanently settled estate and consists of any part of a village and the inamdar is the owner of the Kudivaram as well as the melvaram.

An inamdar who holds under a Zamindar subject to the payment of quit rent to him is not a land-holder within the meaning of S. 3 cl. (5) of the Act.

Appala Narasimhulu v. *Sanyasi.* I. L. R. 38. M. 33. dissented from.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge at Berhampore in Appeal Suit No. 20 of 1918, preferred against the decree of the Court of the Additional District Munsif of Berhampore in Originel Suit No. 284 of 1916.

M. S. Ramanuja Aiyangar for *C. S. Venkatachariar,* for the Appellant.

A. C. Sampath Aiyangar, for the 1st Respondent.

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* S. A. No. 859 of 1918. 1st December 1919.

Sri Gadadhardoss Bavaji v. Suryanarayana Patnaik.

The Court made the following,

Order :—The lower Appellate Court has not given findings on the following questions.

1. Whether the cadjan deed Exhibit A is genuine and whether on the right construction of that deed it was a grant also of the kudivaram interest besides part of the melvaram interest in the plaint lands?

2. On the evidence taken as a whole what is the correct conclusion on the question whether the inam is a post settlement inam or a pre-settlement inam ?

As we consider it desirable to have definite findings on these points we remand the case to the Lower Appellate Court for submission of such findings on the evidence on record within four weeks of the re-opening of this Court after recess. Ten days will be allowed for filing objections.

[In compliance with the above order the Temporary Subordinate Judge at Berhampore submitted the following findings:—

On the 1st issue that the cadjan deed Exhibit A was not genuine ; on the 2nd issue that the inam was a subsequent inam.]

The Court delivered the following.

Wallis, C. J.

Judgments.—*The Chief Justice*:—We accept the finding that the cadjan deed Exhibit A is not proved. There is however in this case nothing to rebut the presumption recently laid down by the Privy Council that the grant to the inamdars was a grant of the proprietary right in the suit land ncluding the kudivaram as well as the melvaram interest. There is, also, no sufficient reason to interfere with the finding on the second additional issue assuming it to be material that the inam in question was created after the permanent settlement of the Estate.

The suit lands are situated in the village of Thandipuram in the permanently settled Zamindary of Surangi and are held of the Zamindar by the inamdar at a kattubadi or quit rent of Rs. 15 payable to the Zamindar. If the whole village had been granted, it would itself have constituted an estate within the meaning of the Madras Estates Land Act as coming within the words " one or more villages " of a permanently settled estate in S 3 (2) (*e*) and the Act would have been applicable to ryots

Sri Gadadhardoss Bavaji. v. Suryanarayana Patnaik.

Wallis, C. J.

holding under the inamdars. It has, however, been contended before us that, although the lands, which are only part of a village, are not made an estate in themselves by virtue of this clause, the Act is rendered applicable because the inamdaris "a land-holder" within the meaning of clause 5. Before coming to the wording of this definition, it is desirable to examine the general scheme of the Act, in the light of which the definition in Clause 5 of Section 3 (2) must be interpreted, with a view of seeing if it was really the intention of the legislature to apply the provisions of the Act as between the inamdar and his tenants where the land is situated in a permanently settled estate and consists of any part of a village and the inamdar is the owner of the kudivaram as well as the melvaram. Now the Act is called the Madras Estates Land Act and its general scope is limited by the definition of estate in S 3 (2)., That definition is re-produced with one important modification from Madras Acts XI of 1894 and IV of 1897 where it had been found convenient to answer the purposes of these Acts ; but, whereas clause (d) in that Act ran "any village of which the grant was made or had been confirmed by the British Government" this appears in the present Act as "any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been made, cofirmed or recognised by the British Government, or any separated part of such village." Therefore, as regards inams outside the large estates coming under clauses (*a*) (*b*) and (*c*), it is clear that the legislature did not wish the Act to apply between the inamdar and his tenants where the inamdars owned the kudivaram as well as the melvaram, or where land was only part of a village unless it had been separated from the rest of the village. This being the policy of the Act as regards inams outside large estates as defined in clauses (*a*) (*b*) and (*c*) the next question is whether it was the intention of the legislature that the Act should apply to such inams when the lands were situated within these large estates. Looking at the matter as between the inamdar and his tenants, there seems no strong reason for making the Act inapplicable where the quit rent is payable directly to the Government, and applicable where it is payable to the Zamindar or poligar as in clauses (*a*), (*b*) and (*c*). It is *prima facie* unlikely that the legislature should have intended to apply a different rule in two cases and, if it did, it would have so provided expressly. In one class of cases it has so expressly provided because clause (*e*) constitutes any portion of one of the larger estates dealt with in clauses (*a*) (*b*) and (*c*) an estate of itself within an estate for the purposes of the Act where it consists of one or more villages and is held on a permanent under-tenure, whether tenure-holder or inamdar owns the kudivaram or not. The legislature having thus expressly made the Act apply as between the inamdar and his tenants in the case of certain inams in these large estates by virtue of the definition in clause (*e*), the next question is whether it intended to nullify that definition and render it altogether nugatory by adopting a few lines lower down a definition of " land-holder" wide enough in terms to include holders of inams and other under-tenures in the larger estates, where the inam in question did not consist of one or more villages, but as here of a lesser extent. The onus of showing that the definition of landholder had this extraordinary result is strongly on those who affirm it.

To come now to the definition itself, 'land-holder' is defined in the first part of clause 5 as meaning "a person who owns an estate or part thereof." Stopping here, an inamdar who holds under a *Zamindar* subject to the payment of quit rent to him is not the owner of the inam land in the ordinary legal meaning of the word owner, as held in *Maharaja of Vizianagaram* v. *The Collector of Vizagapātanam* where the authorities are cited. So long as a full owner in making a grant reserves an interest to himself, as by way of rent he and his successors continue to be the owners, no matter how insignificant may be the interest he reserves for himself. There is no reason for attributing a different meaning to the term owning an estate in the present definition. No doubt where an inam is an estate within an estate by virtue of the definition in Clauses (*c*.) (*d*). of S. 3 (2) as the object of the inclusion is to apply the Act between the inamdar and his tenants, the inamdar must be held to be the land-holder for the purposes of the Act, but that is, not because he comes within the definition as owning an estate, but because it would be

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1. (1914) I. L. R. 38 M. 1128.

repugnant to the subject or context to apply the strict definition of "land-holder" to such a case.

The main contention, however was that in a case such as the present the inamdar comes within the definition of land-holder, not because he is a person "owning an estate or part thereof" but because the clause proceeds to include in the term land-holder " every person entitled to collect the rents of the whole or portion of the estate by virtue of any transfer from the owner or his predecessor-in-title or of any order of a competent Court or of any provision of law". What are to be collected here are " the rents of the whole or any portion of the estate" and rent is defined in clause (ii) as meaning " whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land *in his estate* for the purpose of agriculture." It is a payment to a land-holder for the use or occupation of land in his estate, and cannot therefore include a payment by tenants to an inamdar for use and occupation of land in an estate which is not the inamdar's estate but in the estate of the superior land-holder. Not only then is the construction contended for opposed to the scheme of the Act, and the apparent intention of the legislature as I have already endeavoured to show, but it cannot be arrived at without disregarding the definition of " rent" which itself has been framed to fit into the general scheme of the Act. There is in my opinion no sufficient reason for refusing to apply the definition of " rent in clause (ii) to the word "rents" in clause (v), and full effect can be given to that definition by reading the latter part of it as intended to include, as it says, persons entitled to collect the rents due to the owner of the estate such as farmers or assignees of such rents by way of mortgage etc. Whatever construction be put upon it, it affords in my opinion no justification for bringing inams such as that with which we are dealing within the operation of the Act contrary to the intention of the legislature as sufficiently indicated in the definition of "estate " " rent " and " ryot " which are correlative and must be read together.

The contention now put forward is no doubt supported by the decision in *Appala Narasimhulu* v. *Sanyas* [1] which has been followed in several cases. In that and the subsequent decisions many of the considerations I have set out were not dealt with and were apparently overlooked. I am unable with great respect to follow them, as I am satisfied that it was not the intention of the legislature to apply the Act to this class of cases, and it appears to me to be of great importance that an Act of this kind should not be extended by strained construction to cases not contemplated by the legislature. If cases such as this are to be brought under the Act, it should be by an amendment of the existing Act. For these reasons I agree with the Subordinate Judge and would dismiss this Second Appeal with costs.

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[1] (1912) I. L. R. 36 Mad. 38.

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.—I regret that I have the misfortune to differ from my lord the Chief Justice in this case. I agree that, after the resent decisions of the Privy Council, we must hold that the post settlement grant made to the inamdar (the plaintiff's ancestor) was a grant of both warams. It is also clear that the inam not being a whole village or part of permanently settled estate separately registered, the lands themselves do not form an estate within the definition of S. 3, clause 2 (*b*), (*d*) or (*e*) of the Estates Land Act.

The decision in this case therefore depends solely upon the answer to the question whether an inamdar to whom lands were granted by the Zemindar after the settlement and out of the lands included in the permanently settled estate is a landholder within the definition of clause 5 of S. 3. If an inamdar can be said to *own* part of an estate, he clearly comes under the definition of land-holder. If, again, he can be called a person "*entitled to collect the rents of any portion of an estate by virtue of*" the inam grant (which is Clearly a transfer), then also he comes under the definition of land-holder and S. 6 applies in favor of the ryots holding lands under him. No, inamdar of a *whole village* is admittedly a landholder, because the whole village itself is an estate and he *owns it as an inamdar* even though he might be paying some kattubadi or jodi to *the higher owner* the Zamindar. Thus the words "persons owning part of an estate" in Clause 5 of S. 3 admittedly include several classes at least of inamdars also; notwithstanding that their ownership is accompanied by the recognition of a higher owner the Zamindar) through their payment of jodi or kattubadi to the Zemindar. Hence it seems to me that a minor inamdar also, though he may not own a whole village in an estate as part of an estate, does own in the very same sense his inam lands which are undoubtedly part of the permanently settled estate and hence he comes under the definition of land-holder even within the first portion of the definition of land-holder. If, again, "rents" in the second portion of the definition mean " rents and profits," he is included in the second portion of the definition also, where he usually lets the lands to tenants and obtain rents from his tenants. Some inamdars no doubt would still escape falling under the definition of " land-holder", that is those inamdars to whom inams had been granted *before* the permanent settlement *without reservation of kattubadi or jodi.* I therefore think that the construction placed by the uniform decisions of this Court on the definition of " land-holder " does not render altogether nugatory the definition of an "estate" in Clause 2 (*e*)of S. 3 as it does exclude some inamdars from the provisions of the Act, that is many pre-settlement Inamdars. As regards all post settlement Inams, their grants were grants of land out of an Estate and such grants cannot prevent those lands from continuing to be "part thereof," that is, part of the estate, either that part forms a whole village (in which case the Inamdar admittedly does own it) only defined lands not forming a whole village.

Again the Madras Estates Land Act came into force in July 1908. It naturally took about 3 years for the question whether a Dharmila minor inamdar is or is not a " land-holder" to arise before the High Court for direct decision after contest in a lower Court or Courts. The earliest direct decision on this point I have come across is the one in C. R, P. No. 895 of 1910 dated 9—11—1911, where Abdur Rahim, J., held that a minor Dharmila Inamdar is a " land-holder." For more than eight years now, that view has held the ground. Sundara Aiyar, J., and myself followed it in *Appala Narasamuhulu* v. *Sanyasi* [1] and I find that a majority of the Judges of this Court have followed the same opinion. I am therefore unwilling to depart from this catena of decisions, especially as it is very difficult to get at the real and final intention of the

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1. (1912) I L. R. 38 M. 38.

legislature from the words of an Act whose language was added to and modified during its long progress through the Legislative Council in various ways, according as the party favourable to the land-holder or the party favourable to the tenants got the upper hand in debates from time to time. I would therefore allow the appeal and dismiss the suit as the tenants had obtained full occupancy right under S. 6, on the date of this suit. As regards costs, I would give costs in this second appeal to the appellant (3rd defendant), but as S. 6 was not relied on in the Court of the District Munsif I would order the parties to bear their respective costs in the lower courts.

Result—The appeal is dismissed with costs.

A. S. V.

PRIVY COUNCIL.

PRESENT :—LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

[On appeal from the High Court at Madras.]

Poosathurai ... *Appellant**.

v.

Kannappa Chettiar and others ... *Respondents.*

P. C.
Poosathurai
v.
Kannappa Chettiar.

Undue influence-Dominating the will of another not sufficient—Use of position to obtain unfair advantage essential—Burden proving that no domination was practised, when it arises—Indian Contract Act, (Act IX of 1872) *Ss.* 14, 16.

Undue influence is not established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and that the other was in a position to dominate the will of the first in giving it.

To render influence 'undue' it must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid.

It is only when the bargain is with the influencer and is in itself unconscionable that the burden is thrown upon the influencer to establish affirmatively that the other party was scrupulously kept separately advised in the independence of a free agent.

Appeal from a decree of the Madras High Court dated July 30th, 1912 reversing a decree of the Subordinate Judge of Madura (East).

The facts of the case are sufficiently stated in their Lordship's judgment, for which alone it is reported.

Sir Erle Richards, K. C. and *Dube,* for Appellant;

De Gruyther, K. C. and *Kenworthy Brown,* for Respondents.

P. C. Appeal No. 3 of 1918. *23rd October and 18th November 1919.

The arguments were directed to the facts, the only issue being whether the execution of the sale-deed which it was sought to set aside had or had not been procured by undue influence.

Their Lordship's judgment was delivered (November 18, 1919) by

Lord Shaw.

Lord Shaw—This suit has been brought by the present appellant for the cancellation of a deed of sale executed by him on the 17th March, 1906. Cancellation was decreed by the Subordinate Judge, and the decision was reversed by decree of the High Court of Judicature at Madras.

The real and only point at issue between the parties is whether the deed in question should be cancelled on the ground of undue influence. In the Court of the Subordinate Judge this point did not clearly appear from the issues which were framed. But an examination of the proceedings and evidence shows that it is to an issue of this kind that the plaintiff was throughout groping. The High Court properly discerned that ; and the learned Counsel for the appellant properly presented the case from that point of view.

It is not necessary to speculate whether the provisions of the Indian Contract Act differ in any particulars from the doctrines of the English Law upon this subject. For no such differences are suggested to have any bearing on the issue between these parties. The issue in the present suit is an issue of fact, and there does not appear to the Board to be any sufficient reason for doubting that the judgment arrived at in the High Court is sound.

The Indian Contract Act by S. 14 provides that "Consent is said to be free if it is not caused by . . . undue influence as defined by S. 16." By S. 16 (1) "the contract is said to be induced by 'undue influence' where the relations existing between the parties are such that one of the parties is in a position to dominate the will of the other, and uses that position to obtain an unfair advantage over the other." Sub-S. 3 of the same section may also be referred to. It provides that:—

"Where a person who is in a position to dominate the will of another enters into a contract with him, and the transaction appears on the face of it, or on the evidence, to be unconscionable, the burden of proving that such contract was not

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inducedby undue influence shall lie upon the person in the position to dominate the will of the other."

It is a mistake (of which there are a good many traces in these proceedings) to treat undue influence as having been establised by a proof of the relations of the parties having been such that the one naturally relied upon the other for advice, and the other was in a position to dominate the will of the first in giving it. Up to that point "influence" alone has been made out. Such influence may be used wisely, judiciously and helpfully. But, whether by the law of India or the law of England, more than mere influence must be proved so as to render influence, in the language of the law, "undue." It must be established that the person in a position of domination has used that position to obtain unfair advantage for himself, and so to cause injury to the person relying upon his authority or aid.

And where the relation of influence, as above set forth, has been established, and the second thing is also made clear, viz., that the bargain is with the "influencer" and in itself unconscionable then the person in a position to use his dominating power has the burden thrown upon him, and it is a heavy burden, of establishing affirmatively that no domination was practised so as to bring about the transaction, but that the grantor of the deed was scrupulously kept separately advised in the independence of a free agent.

These general propositions are mentioned, because if laid alongside of the facts of the present case, then it appears that one vital element perhaps not sufficiently relied on in the Court below, and yet essential to the plaintiff's case, is wanting. It is not proved as a fact in the present case that the bargain of sale come to was unconscionable in itself or constituted an advantage unfair to the plaintiff; it is, in short, not established as a matter of fact that the sale was for undervalue.

The subject of the sale, to mention only one particular was not the two villages mentioned in the plaint but the property in the villages burdened with usufructuary mortgages which did not expire for eighteen years. These mortgages amounted to Rs. 51,000. The crucial enquiry on the point of sufficiency of consideration accordingly was, what on the date of the sale was the *de presenta* value of the plaintiff's right of property in these

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villages? Beyond a loose reference to a lakh of rupees, without any specification as to whether this referred to the present value or to deferred value, or to value of the property, the evidence is entirely silent.

Nothing has been brought in argument before the Board to satisfy their Lordships' minds that the price of Rs. 6,000, even coupled with the demand for the wiping off a debt of about Rs. 3,000, incurred for litigation and for the honouring by the plaintiff of a promissory note executed by him for another Rs. 3,000, was not a fair consideration for the transaction.

Their Lordships think it unnecessary to enter into the further grounds stated by the learned Judges of the High Court for their decision, although they express no disagreement with these grounds in themselves.

The true contradictor in the issue was the party to the transaction, the vendee. But the plaintiff endeavoured to strengthen the case for cancellation by convening also as defendants his two uncles now also his two fathers-in-law.

Their Lordships do not doubt that in the category of cases of undue influence might be covered cases where the party to a transaction exercised that influence in conspiracy with or through the agency of others. But they think it right to say that no proof has been given of any such conspiracy or agency in the present case.

When it is added that the consideration paid was in part actually defrayed to cover expenses incurred by the plaintiff on the occasion of his marriages to the two daughters of his uncles, the first and second defendants, and that these marriages took place, it would require fairly strong evidence to induce any Court to give countenance to the suggestion that his uncles and fathers-in-law had conspired with the third defendant to subject the plaintiff to unconscionable loss. To this element weight is properly attached in the Court below.

Their Lordships humbly advise His Majesty that the appeal stand dismissed with costs.

Solicitors for Appellant :—*Chapman Walker and Shephard.*

Solicitor for Respondents :—*Douglas Grant.*

A. R. P.

PRIVY COUNCIL.

PRESENT :—LORD ATKINSON, LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

[On Appeal from the Court of the Judicial Commissioner, Upper Burma.]

Ma Hnit and others ... *Appellants.**

v.

Hashim Ebraham Meter and another... *Respondents.*

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Contracts by minors—Void and not merely voidable—Capacity to contract—Counterclaim by a third party and costs.—

Under the Indian Contract Act, where a minor purports to contract, his alleged contract is void and not merely voidable : he is a person who is not competent to contract.

A counterclaim in a suit can only be made by a person who is a defendant the suit.

Costs allowed against a person, not a party making such a counterclaim.

Appeal from a decree of the Judicial Commissioner's Court of Upper Burma, affirming a decree of the District Court of Magwe.

The facts of the case will appear from their Lordship's judgment. The appellants sued Ali Hashim Meter and Fatima Bibi on a promissory note purporting to be signed by (a) Fatima Bibi as guardian for Ali Hashim Meter (b) Ahmed Madari. The promissory note was alleged on the plaint to have been given as part payment of the price of an oil-well. Ahmed Madari counterclaimed for money already paid for this oil-well, alleging that the plaintiffs had failed to convey it as promised. The trial Judge dismissed the suit on the ground of failure to convey and consequent want of consideration for the pro-note : he decreed the counterclaim. An appeal to the Judicial Commissioner of Upper Burma was dismissed. Hence the present appeal.

Sir W. Garth and *J. K. Ray*, for appellants, submitted that appellants were not to blame for the failure to convey. The duty of the purchaser, having regard to the analogy of S. 55 of the Transfer of Property Act, 1882 which is as defining what ought to be the practice in Upper Burma, was to tender a conveyance. *Ma Hnit and others* v. *Maung Po Ya* (Privy Council Appeal No. 37 of 1918. decided 22nd May 1919 ; unreported)‡

They have not done this, and till they have so done there was no duty to convey. For the same reason the counterclaim must fail.

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* P. C. Appeal No. 102 of 1918. 7th July and 28th October, 1919.

‡ See 31 C. L. J. 87.

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The proceedings were irregular and as Madari was not a party his counterclaim could not in any event succeed: but we submit he should pay the costs: he has accepted the position and must be dealt with on that footing.

Kenworthy Brown for respondents: The action must fail. The signatures were admittedly made by Madari. He says he holds Fatima Bibi's power of attorney, but the power is not proved. Anyhow, Fatima's signature was as guardian, and it was not within the power of a guardian, to pledge the credit of the infant.

As to our failure to tender a conveyance, it would be farcical to tender one to a man who has no title and cannot convey.

[*Sir John Edge*:—The fact of the well being in another man's name is no proof whatever that Po Ya had no title.

Lord Phillimore. You have to ask him to get in the title; you haven't done so. You never gave notice.

Sir John Edge:—If a vendor refuses to convey that is another thing.]

The counterclaim is provided for by O. 8 R. 6. The objection now raised is met by S. 99 of the Civil Procedure Code, 1908. Our attention has never before been directed to this point: there might be fresh evidence which would dispose of it.

[*Sir John Edge*:—Is this a set-off or a counterclaim.]

A Counterclaim.

[*Sir John Edge*:—There is no section in the Civil Procedure Code which authorises such a counterclaim. Your claim has been put forward in an illegal way, a way not authorised by law.]

K. Brown:—Then I submit that all the proceedings on the counterclaim should be set aside. It is possible that further proceedings might be taken on it successfully. The various questions which have been half argued should be left open.

As to costs. I submit the course taken in the Courts below should be considered. The infants anyhow have a right to costs.

Sir W. Garth in reply:—I can't contend that the suit as it stands was rightly framed. Madari was allowed to put in his counterclaim and deposed that he was the only person responsible.

[*Lord Phillimore*:—The minor couldn't make the pro-note: the woman didn't make it.]

These points were not taken in the Courts below. Both parties are in fault, and the suit and counterclaim must both go: but anyhow we are entitled to costs against Madari.

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[*Mr. Ameer Ali* But he wasn't a party.]

Their Lordships' judgment was delivered (October 28th 1919) by *Sir John Edge*: This is an appeal from a decree, dated the 16th August, 1916, of the Additional Judge of the Court of the Judicial Commissioner, Upper Burma, which affirmed a decree, dated the 10th August, 1912, of the Additional Judge of the District Court of Magwe. Maung Po Ya and his wife Ma Hnit were originally the plaintiffs in the suit in which this appeal arises. Maung Po Ya has died, and Ma Hnit on her own behalf and as his legal representative has brought this appeal.

Maung Po Ya on the 24th March, 1909, by an agreement in writing contracted to sell to Hamed Ebrahim Madari an oil-well No. 2076, at Natsin Quarter, Twingon, for Rs. 40,000, of which Rs. 5,000 were paid as earnest money, Rs. 15,000 were to be paid at the expiration of 45 days from the date of the agreement and at the expiration of such 45 days for the balance of Rs. 20,000 and interest thereon, Madari was to re-mortgage for a term of six months to Po Ya two oil-wells as security. The earnest money and the Rs 15,000 were paid by Madari to Po Ya and it was subsequently arranged between the parties that instead of the mortgage Madari should give to Po Ya promissory note for Rs. 20,000 and interest thereon. In pursuance of that arrangement, Madari on the 7 May, 1909, gave to Po Ya and Ma Hnit the following promissory note :—

" Yenagyaung.
" The 7th May, 1909.
" The 4th Waning of Kason, 1271.

" Rs. 20,000.

" On demand we the undersigned Ali-Hashim Meter and guardian, Fatima Bibi, do hereby promise to pay to Twinza Ko Po Ya and Ma Hnit or order the sum of Rs. 20,000 (twenty thousand) with interest at Re. 1/- per cent. per mensem.

" Fatima Bibi,
" Guardian of Ali Hashim Meter.
" Ahmad Madari."

It is stated in the appellants' case and may possibly be the fact that Maung Po Ya and his wife Ma Hnit were the owners of the oil-well, but if they were, their legal title to the well was incomplete until after this suit had been instituted. Fatima Bibi, who is one of the respondents to the appeal, is the wife of Hamed Ebrahim Madari, and is stated in the respondents' case to have been a minor at the date of the note.

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Ali Hashim Meter is a nephew of Hamed Ebrahim Madari, and was a minor at the date of the promissory note. He is represented in this appeal by Hashim Ebrahim Meter, who is described as the guardian of Ali Hashim Meter, but their Lordships do not know whether or not Hashim Ebrahim Meter is the legally appointed guardian of Ali Hashim Meter. Their Lordships have been informed by Counsel that Ahmed Madari, who signed the promissory note, is Hamed Ebrahim Madari. Hashim Ebrahim Madari may be, and possibly is, Hamed Ebrahim Madari.

It is stated in the appellants' case that the promissory note was executed by Hashim (Hamed) Ebrahim Madari in the benami names of Ali Hashim Meter and Fatima Bibi. In a counter-claim, which will be again referred to, Hamed Ebrahim Madari alleged that he in the names of Ali Hashim Meter and Fatima Bibi had purchased the oil-well from Maung Po Ya. However that may have been, the names of Ali Hashim Meter and Fatima Bibi do not occur in the agreement in writing of the 24th March, 1909.

The promissory note was dishonoured. Thereupon this suit, No. 13 of 1911, was brought upon the promissory note in the District Court of Magwe by Maung Po Ya and Ma Hnit against Ali Hashim Meter and Fatima Bibi to recover from them Rs. 21,160 principal and interest alleged to be due by them under the promissory note. In the plaint it was alleged that the "two defendants had executed and signed" the promissory note. Subsequently, on the 3rd February, 1912, Maung Po Ya presented a petition to the District Court, in which he stated:—

> "1. In this case, in the presence of the first and second defendants, and with their consent, their representative Hamed Ebrahim Madari signed (the promissory note.)
>
> "2. Therefore under Order VI, rule 17, I pray that I may be allowed to amend the plaint as follows, namely: 'In the plaint I have stated that Ali Hashim Meter and Fatima Bibi signed; in place of this statement, insert the statement that in their presence and with their consent, their Attorney Hamed Ebrahim Meter signed.'"

Their Lordships do not know what order, if any, was passed on the petition of the 3rd February, 1912. It will be observed that the plaintiffs were suing on a promissory note alleged to have been made in their favour by a minor through his alleged guardian, and that the defendants are the minor and the alleged guardian, who apparently was a minor when the promissory note was made. There is nothing in the record before the Board to suggest how Fatima Bibi could have been even the natural guardian of the minor, or that she had been appointed by the Court his guardian in the suit, or how a minor could legally be a party to the contract.

No written statement appears to have been filed in answer to the suit by Ali Hashim Meter or by Fatima Bibi, but Hamed Ebrahim Madari, alleging himself to be the guardian of Ali Hashim Meter and of Fatima Bibi, filed on his own behalf a "cross-claim," which was a counter-claim, and it was admitted to the record of the suit as a counter-claim.

In his counter-claim, Hamed Ebrahim Madari referred to Maung Po Ya as the "defendant" and alleged :—

"1. In suit No. 13 of 1911 of this Court, defendant (Maung Po Ya) has made a false claim against first defendant, Ali Hashim Meter, and second defendant, Fatima Bibi, on a promissory note. Defendant (Maung Po Ya) came to me and said that oil well No. 2076 at Natsin Quarter, Twingon, belonged to him and asked me to buy it outright for Rs. 40,000.

"Accordingly, on the 24th March, 1909, the 4th waxing of *Hnaung Tagu*, 1270 by mutual consent, the accompanying document (the agreement in writing of the 24th March, 1909) was executed and signed, and I paid Rs. 5,000 as earnest money, and then paid another sum of Rs. 15,000 ; total, Rs. 20,000.

"2. After the execution of the agreement and payment of the earnest money, Maung Po Ya asked me to execute a promissory note for the balance of Rs. 20,000 on interest at Re. 1- per cent, per mensem, and said that he would deliver the oil-well No. 2076 to me by means of a registered document. I trusted him, and therefore signed the promissory note for Rs. 20,000 produced by Maung Po Ya in Court, the money being the balance of the price of the oil-well which I have purchased in the names of my son (in fact, his nephew) Ali Hashim Meter the first defendant, and my wife Fatima Bibi, the second defendant, who is a *purdanashin* woman.

"3. After the execution of the promissory note, I asked Maung Po Ya to deliver the oil-well No. 2076 to me. But Maung Po Ya said that he would deliver it to me by means of a registered document, only on my payment of the interest due on the promissory note for Rs. 20,000. Accordingly I had to pay him another sum of Rs. 4,000 as interest on that promissory note for Rs. 20,000.

"4. After the payment of the said Rs. 4,000 as interest, Maung Po Ya did not deliver the well to me. Therefore, in order to sue for the delivery of the well which I had already purchased and paid for I made enquiries in the office concerned, and found that the well No. 2076 belonged to one Maung Hla and not to Maung Po Ya, to repay Rs. 24,000, the earnest money and interest paid by me, and cancel the original agreement and the promissory note, but he would not do so. . . .

"5. Wherefore, I pray that defendant's (Maung Po Ya's) suit against my wife and son (nephew) on the promissory note may be dismissed with costs, and that a decree, with costs, may be granted me directing defendant (Maung Po Ya) ·

" (*a*) To repay to me earnest money ...	Rs. 20,000
" Interest	" 4,000
"Total Rs.	24,000

and future interest."

The counter-claim is signed "Ahmed Ebrahim Meter, guardian of Ali Hashim Meter and for Fatima Bibi."

In the same suit (No. 13 of 1911) Maung Po Ya filed a written statement as a defence to the counter-claim. In his written statement Maung Po Ya challenged Madari's right to file a counter-claim in the suit thus:—

"1 In suit No. 13 of 1911, the plaintiffs are myself and Ma Hnit, and defendants are Fatima Bibi and Ali Hashim Meter. In the Cross-claim by Madari, I alone am made defendant. Thus the parties are not the same and therefore the cross-claim should not be made in the same suit. If plaintiff wishes to make any claim, he should institute a separate suit."

Maung Po Ya was apparently under the impression that if the parties to the suit and to the counter-claim had been the same, the Court would be competent to deal with the counter-claim on the merits. The Additional Judge of the District Court on the 29th April, 1912, framed the following amongst other issues:—

"1. Whether the defendant's cross claim was maintainable?

The ruling of the Additional Judge of the District Court on that issue is best given in his own words as follows :—

"So far as the cross claim is concerned, it is admitted by the parties that the sum of Rs. 20,000 and interest paid by the defendants to Maung Po Ya were to account of the price of oil-well, and as such the defendants' cross claim for return of the money is quite maintainable. This is my answer to first issue."

On the merits of the counter-claim the District Judge expressed himself thus :—

According to the agreement, Exhibit I, the plaintiff, Po Ya was to convey the well in the event of the defendants executing a mortgage of their two wells for Rs. 30,000 (Rs. 20,000 being balance due for purchase of the well in dispute and Rs. 10,000 was the amount for which the defendants have already mortgaged before the said two wells to Maung Po Ya), but both the parties admitted that the agreement to execute the mortgage on two wells was substituted by an agreement to execute a promissory note for Rs. 20,000, only, any that accordingly the defendants executed the promissory note for Rs, 20,000 and have since paid interest. The defendants have therefore performed their part of the contract embodied in the agreement. Exhibit I, and this fact is also established by the said agreement being in the possession of the defendants. It now remains for the plaintiff, Maung Po Ya, to perform his part of the contract by conveying the well to defendants, but there was not a particle of evidence to show that he ever offered the well. In fact, he was not in a position to transfer the well until a few days after the institution of this suit, when the well was transferred into his name. . . . . The act of Po Ya in delaying the transfer of the well to the defendants for so long a period as over two years after the execution of the promissory note, Exhibit A, therefore amounts to failure on his part to perform his part of the contract and as such the agreement, Exhibit I, becomes voidable at the option of the defendants, and Po Ya is now bound to return all the money which he has received from the defendants to account of the well."

As to the claim on the promissory note, the additional District Judge expressed himself thus :—

" Further, considering that the well has not been conveyed as yet to the defendants; and that no mention was made in the plaint that Po Ya had any intention of making over the well before he is actully paid for the promissory note, Exhibit A, I hold that the promissory note was one without consideration, and the plaintiffs' claim on the said promissory note must under any circumstances fail."

The Additional District Judge dismissed the suit, and on the counter-claim made a decree for the defendants to the suit against Maung Po Ya for Rs. 23,800 with costs.

The plaintiffs appealed to the Court of the Judicial Commissioner, Upper Burma. Before the appeal was heard, Maung Po Ya died and his widow Ma Hnit was duly appointed his legal representative. The Additional Judicial Commissioner did not consider whether the counter-claim was competent, and taking the same view of the facts and the law as had been taken by the Additional District Judge, he dismissed the appeal. From that decree this appeal has been brought.

Each of the Courts below omitted to consider whether a minor is a person competent to contract. Under the Indian Contract Act, where a minor purports to contract his alleged contract is void and not merely voidable ; he is a person who is not competent to contract. See *Mohori Bibi and another* v. *Dharmodas Ghose,* [1] See also *Mir Sarwarjan* v. *Fakhruddin Mahomed Choudhuri and others,* [2]. Ali Hashim Meter certainly was a minor, and Fatima Bibi apparently was a minor when the promissory note was made. The suit should have been dismissed on that ground if there was no other ground for dismissing it. Although the appointment

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[1] (1903) I.L.R. 30 Cal. 539=30 I.A. 114. [2] (1911) L. R. 39 I. A. 1=21 M.L.J. 1156.

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by a Court of a guardian for the suit of a minor defendant sued on a contract which purported to have been made by him would not get over the difficulty that he was incompetent to contract, no guardian for the suit appears to have been appointed by the Court, although each of the Judges below ought to have seen from the proceedings before them that Ali Hashim Meter and Fatima Bibi were minors. They ought to have observed that Hamed Ebrahim Madari described himself in his counter-claim as their guardian. These Judges ought also to have considered the form of the promissory note upon which Fatima Bibi was sued as a principal, and whether, even if she had been of full age at the date of the promissory note, she had made herself liable on it.

Even assuming for the purpose of argument, but not deciding, that the practice as to filing of counter-claims is the same in India as in England, this counter-claim is bad, inasmuch Hamed Ebrahim Madari, who counter-claimed, is not a defendant to the suit.

Their Lordships will humbly advise His Majesty that this appeal so far as it relates to the dismissal of the suit should be dismissed, and that so far as it relates to the counter-claim should be allowed, and the counter-claim be dismissed with costs in the Courts below. There will be no costs of this appeal.

Solicitor for Appellants :—*E. Delgado.*

Solicitor for Respondents :—*Lowe & Co.,*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE OLDFIELD, AND MR. JUSTICE SESHAGIRI AIYAR.

The Madras and Southern Maharatta
Railway Compay, Limited, Madras...*Petitioners** (*Defendants*)
v.
Matti Subba Rao ... *Respondent.* (*Plaintiff*).

The
Madras and
Southern
Mahratta
Railway
Co., Ltd.
v.
Matti
Subba Rao.

Indian Railways Act S. 72—*Indian Contract Act Ss.* 151, 152 *and* 161—*Risk note, construction of—"Loss", meaning of—What amounts to "wilful neglect" within the meaning of the risk note—Liability of a person employing servants for the latter's acts.*

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* C. R. P No. 742 of 1917. 10th December, 1919.

The Madras and Southern Mahratta Railway Co., Ltd. v. Matti Subba Rao.

Railways in India are not common carriers; and in the absence of a special contract they are liable only as bailees under the Indian Contract Act. *The Irravadi Flotilla Co* v. *Bhugwandas*, followed [1].

Where goods are consigned by a Railway under a risk note under contract with the consignor that in consideration of the lower charge he has paid, he would hold the Railway Company "harmless and free from all responsibility for any loss, destruction or deterioration of, or damages to the consignment from any cause whatever, except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of a Railway administration or to theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment; provided the term 'wilful neglect' be not held to include fire, robbery from a running train or any other unforeseen event or accident", from the terms "loss" to the goods consigned implies that the goods should have been deprived of the merchantable character in which they were accepted for transmission; and the consignor can recover damages from the Railway Company only if the goods consigned are entirely deprived of value.

East Indian Railway Co., v. *Nilkanta Roy* [2], *and Bombay Baroda and Central Indian Railway Company* v. *Ambalal Sevaklal* [3] dissented from.

Per *Seshagiri Aiyar, J*:—There would be wilful neglect on the part of a Railway servant if he acted under the supposition that his action might be michievous and with an indifference to his duty to ascertain whether it was mischievous or not.

Persons who undertake to do certain things and who employ servants to do those things are responsible for the acts of those servants done in the discharge of the duty entrusted to them.

Petition under Section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the 2nd Additional District Munsif of Rajahmundry in S. C. S. No. 751 of 1916.

D. Chamier instructed by Brightwell and *Moreshy* for Appellants.

V. Ramadoss for Respondent.

The Court delivered the following.

Oldfield, J.

Oldfield, J.—The decision of the Second Additional District Munsif of Rajamundry comes before us under S. 25 Provincial Small Cause Courts Act, Act IX of 1887. He has held the defendant Railway Company liable on a risk note in respect of one out of a consignment of bales of gunny bags, of which plaintiff was consignee. The risk note, Exhibit B is in form B and is a contract by the consignor in consideration of the lower charge he has paid to hold the company "harmless and free from all responsibility for any loss, destruction,

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1. (1891) I. L. R. 18 Cal. 620=18 I. A. 121. 2. (1918) I. L. R. 41 Cal. 576.
3. Indian Railway Cases 48.

or deterioration of, or damage to the consignment from any cause whatever except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of a Railway Administration, or to theft by or to the wilful neglect of its servants, transport agent or carriers employed by them before, during and after transit over the said Railway or other Railway lines working in connection therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment: *provided the term "wilful neglect" be not held to include fire, robbery from a running train or any other unforeseen event or accident.*"

Two questions have been argued. Firstly, was the injury, which one bale admittedly sustained, due to the wilful neglect of the company's servants? Secondly did that injury amount to loss within the meaning of the exception, which provides for the company's liability?

The first of these questions can be answered shortly in the affirmative. The lower Court held that there had been wilful neglect by the company's servants in (1) unloading inward goods on the outward platform (2) placing a leaking acid package on the bale of gunnies. We cannot follow the first portion of this finding and confine ourselves to the second. Something has been said regarding the burden of proof. But it is unnecessary to discuss its incidence, because the company admitted in its written statement that the package of acid was dropped by its cooly and fell on the bale and defendants' 1st witness deposed to that effect. The acid according to the evidence had leaked on the shoulder of the cooly, having burnt through his coat and he put it down on the bale, disregarding the certainty that it would leak on it also and injure it. We have no doubt that in doing so he was wilfully negligent.

The more difficult question remains whether the injury to the bale is loss, for which the company is liable under the exception in the risk note; and the difficulty arises from the fact that, whilst the exception provides only for the case of loss, the general portion of the note exempts from liability in respect of all claims not only for loss, but also for destruction, deterioration or damage. It is therefore for plaintiff to establish that the bale is lost and the lower Court has found that it is so. The contention for the company is that this finding is wrong and that, the bale being merely damaged, its liability is not established.

This finding in favour of loss appears to rest on the result of an inspection, to which lower Court refers as showing that the bale was completely useless, and also on its statement that the acid penetrated the bale completely and affected all the gunnies. This apparently is also based on the statement of plaintiff's 1st witness in examination in chief that the bale was burnt in the middle, that the acid affected it right through, that not one bag was whole and all the bags seemed to have been damaged. But there is then the fact that as the same witness said in cross-examination, " I saw the burnt bale in Court. It was not yet opened. I cannot say whether whole bags were found in it." It has not been suggested before us that the bale was opened later for the Court's inspection and we cannot understand how the lower Court could satisfy itself as its judgment implies or how it could neglect the witness's latter statement. Its finding on the question of fact must be rejected on the ground that it was reached without reference to material evidence ; and we must therefore remand the case. In doing so it is advisable that we should deal with the legal question which arises and indicate the principle, on which the enquiry on remand should proceed.

To return to the terms of the risk note, it would appear at first sight as though a distinction is drawn between loss and destruction, deterioration and damage and the exception is not intended to apply to cases, in which only the three last mentioned can be established. But, whatever the implication from the separation of these terms, it is clear that the distinction proposed cannot be supported by their use in ordinary parlance. For, whilst loss cannot include deterioration and will always include destruction, it will in some cases include damage, when the extent and nature thereof are sufficient. Shortly we have to decide the point, if any, at which damage becomes loss.

The Madras and Southern Mahratta Railway Co., Ltd. *v.* Matti Subba Rao.

Oldfield, J.

One ground of decision has been suggested, which can be dismissed shortly—that there is no loss, whatever happens to the contents, if the character of the package as such is unaffected by damage sustained by its outward envelope alone. This is based on *Bombay Baroda and Central Indian Railway Company* v. *Ambalal Sewaklal* [1] followed in *East Indian Railway Company* v. *Nilkanta Roy,* [2] and in this Court in C. S. No. 309 of 1914 by Kumaraswami Sastri, J. though only on the ground that, sitting alone, he was not prepared to dissent from the decisions of two Benches in the cases referred to. Those decisions do not commend themselves to us. For they are based on no earlier authority and, with all due respect, it is unreasonable to suppose that the parties, entering into such contracts as Exh. B. have regard to the worthless outer covering, not its contents; the bag, for instance, not the grain without it; or in the present case the rough gunny covering and iron hoops, not the bags inside, in which the bale really consisted.

Another principle suggested is that damage can be identified with loss, only if the goods concerned have been deprived of the merchantable character, in which they were accepted for transmission ; and, if the contract before us were one of insurance, this would be sound. *Asfor and Co.* v. *Blundell* [3] and *Cologan* v. *London Assurance Company* [4]. But there is no question here of insurance in connection with railway contracts, since railways in India are not common carriers. *The Irravady Flottila Company* v. *Bugwandas* [5] ; and the suggestion must therefore be defended on its merits. The objection to it, which must in my opinion prevail, is that even in the absence of a special contract a Railway is under S. 72 (1) Railways Act (IX of 1890) liable only as a bailee under Ss. 151, 152 and 161, Indian Contract Act. It follows that a Railway will ordinarily be liable in damages only according to the actual condition of the goods ; for their full value, if they are rendered totally valueless; for such portions of it, if they have merely sustained deterioration, as would afford reasonable compensation, without reference to their loss or retention of their

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1. Indian Railway Cases 48.
2. (1913) I. L. R. 41 Cal. 576.
3. (1896) I. Q B. 123
4. (1816) 5 M. & S. 447,
5. (1891) I. L. R. 81 Cal. 620.

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merchantable character. It is next material that in the present case the contract embodied in the risk note Exhibit B was made in consideration of the railway's acceptance of a reduced charge; and it therefore cannot be regarded as intended to increase its responsibility. It is then impossbile to accept respondent's contention, which by treating 'loss' in the exception in Exhibit B as equivalent to the 'loss,' destruction, deterioration or damage in the general portion and to the "loss destruction or deterioration" in S. 72 (1) of the Railways Act would leave the Railway under the liability it would have been under, if Exhibit B had never been given. This entails acceptance of the only alternative construction of Exhihit B, that proposed by the Railway and already referred to as consistent with ordinary parlance. It is said that an unreasonable contract results from it. But the form, has, as the Act requires, been approved by Government, and it has not been shown how the acceptance of a smaller responsibility in consideration of a lower charge than that which is normally payable and which respondent's consignor could have paid, if he desired a full indemnity, is oppressive. For these reasons I hold that respondent can recover only if his bale of gunnybags is entirely deprived of value.

The Lower Court must therefore submit a finding on the issue:

"Was respondent's bale of gunny bags when delivered to him of no value ?"

The bale is, it is alleged, with the respondent. The Lower Court will give him an opportunity to produce it in Court and, if it is so produced, will inspect it and the bags composing it, noting their condition in its finding. In any case, fresh evidence may be adduced by both parties regarding its condition and that of its contents. Findings due in two months. Seven days for objections.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J. :—The question raised in this case is one of considerable importance: therefore I have taken the liberty of writing a separate judgment although I do not differ from the conclusions arrived at by my learned brother. The facts are fully set out in the judgment just now delivered. I will first say a few words upon some subsidiary points raised by

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Seshagiri Aiyar, J.

Mr. Ramadoss before dealing with the main question. It was contended by the learned Vakil for the respondent that a Railway Company is not competent to limit its liability to less than the minimum care which the Indian Contract Act imposes on bailees. It is now well settled that under the Indian Law, a Railway Company has not the liabilities of an insurer but only those of a bailee. See *India General Steam Navigation Company* v. *Bhagwan Chandra Pal* [1]. The observations of Sankaran Nair, J. in *Sheik Mahomad Ravuther* v. *The British India Steam Navigation Co.* [2] were relied on for the proposition that a common carrier cannot exempt himself from liability for negligence if such an exemption would be inconsistent with the provisions of the Indian Contract Act. The first observation with reference to this *dictum* is that the learned Judge was dealing with the case of a carrier by sea. The principles applying to carriers by land are not the same which govern the liability of a carrier by sea. In the next place two other learned Judges differed from him on this very question. In a later case *Kuriadan Kumber* v. *The British India Steam Navigation Co. Ltd.*, [3] Justice Sadasiva Aiyar and Justice Tyabji did not act upon this *dictum* of Sankaran Nair, J. I must therefore hold that the contract is enforceable. Reliance was placed on certain English decisions which hold that an exemption from contract by a carrier from liability must be reasonable and just. There is great difference between the English law and the Indian law on this subject. If I understand the position aright, a Railway Company in England would be authorised by Parliament to make its own rules and regulations. It would be created by an Act of Parliament and would have full power to regulate its internal management. Under these circumstances Courts may be at liberty to decide whether the regulations framed by the Company are just and reasonable and whether they are *inter vires* the Act of Parliament. In this country the position is very different. Under Section 72 of Act IX of 1890 a Railway Company may enter into an agreement to limit its responsibility provided it is in a form approved by the Governor-General in Council. It is not denied that the rule with which we are concerned has been sanctioned by the Governor-General in Council. Therefore *prima facie* the rule must be regarded as being within the powers of the Railway Company. It is on the respondent to show that the rule in question which the legislative authority has sanctioned is inconsistent with any portion of the Railways Act, and the learned vakil for the respondent had not satisfied me on this point. I must therefore hold that the rule is *inter vires*. Reference may also be made to *Toonya Ram* v. *East Indian Railway Company,* [1] *Tippanna* v. *The Southern Maratha Railway Company* [2] and *East Indian Railway Company* v. *Bunyad Ali* [3].

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[1] (1913) I. L. R. 40 Cal. 716.
[2] (1908) I. L. R. 32 Mad. 95=18 M. L. J. 497
[3] (1913) 25 M. L J. 162.

Another point relied on on behalf of the respondent is that the word 'loss' in the exemption clause of the Risk Note (Form B) includes "Destruction, deterioration and damage." The note is not a very carefully drafted one, and it may be possible for the Government of India to scrutinise its language on some future occasion. But as it stands at present I am compelled to hold that the word "loss" has a meaning distinct from the other three words mentioned by me. All the four words are placed seriatim in the earlier portion. But when it comes to imposing liability, notwithstanding the contract to the contrary, the draftsman has used the word "loss" alone and has left out the words "destruction, deterioration and damage." I take it that this was done on purpose. Reasonable meaning can be attached to the note as it stands by imputing to the draftsman the intention to hold the company liable only for the loss of a complete consignment of one or more complete packages and by exempting the company from liability where there has been "destruction, deterioration and damage" to such a complete consignment of one or more complete packages. I am not concerned in seeing whether this is good policy, or whether the consigning public will not be injured by it. But construing the language of the note as it stands I can give it only the meaning which I have indicated and not the meaning which the learned vakil for the respondent has suggested.

One or two minor points raised by Mr. Chamier may now be dealt with. The learned Counsel contended that there was no wilful negligence on the part of the Railway Company. and quoted *Heaven* v. *Pender,*[1] for this contention. The District Munsif has found on the facts that there was wilful negligence ; and on the evidence which has been fully commented on before us it seems to me that the Railway Company acted carelessly in the matter. The servant who was employed to carry an acid substance, unable to bear the injury which it inflicted on his shoulders threw the acid over the gunny bags. His act was wilful in the sense that he must have known that the corrosive substance would cause injury to the article over which it was thrown. In *Lewis* v. *The great Western Railway Company*[2], Lord Justice Bramwell said: 'wilful mis-conduct' means mis-conduct to which the will is a party, something opposed to accident or negligence ; the mis-conduct, not the conduct must be wilful." Lower down the learned Lord Justice said: " I am much inclined to think that that would be wilful mis-conduct because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be wiful misconduct." Applying this definition I am satisfied that there was wilful default on the part of the servant.

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[1] (1902) I. L. R. 30 Cal. 257.
[2] (1892) I. L. R. 17 Bom. 417.
[3] (1895) I. L. R. 18 All. 42.

Mr. Chamier next suggested that the act of the servant should not be charged against the Company. It is a well known rule of law that persons who undertake to do certain things and who employ servants to do those things must be held responsible for the act of those servants done in the discharge of the duty entrusted to them. It may be different no doubt if the servant acted in violation of his duties. The very recent case of *Joseph Rand Limited* v. *Craig*[2] establishes this proposition very clearly. Swinfen Eady M. R. pointed out that if the act was done deliberately by the servant to benefit himself that should not be attributed to the master. But if it is a case of carelessness or negligence in the course of employment the master would be held liable. The latter is what actually happened in the present case. Therefore the Company is liable for the conduct of the servant.

Now comes the main question as to whether the package can be said to have been lost. The judgment of Kumara-

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1. 11 Q. B. 503.
2. 3 Q. B. D. 195.
3. (1991) 1 Ch, 1.

swamy Sastri J in C. S. No. 309 of 1914 was quoted before us and also *East Indian Railway Company* v. *Nilakanta Roy* [1]. The learned Judge felt bound by the Calcutta decision and by a judgment of the Bombay High Court to hold that if the outer cover which encloses a parcel was delivered the article cannot be said to have been lost by the Railway Company. The Bombay and the Calcutta cases do not discuss the mattei and it seems to me that they have put too narrow a construction upon the expression "loss". I am inclined to the view that the term "loss" should be construed as including cases where the article consigned is lost to the consignor as such article. If the goods entrusted to the care of the Company cease to have any resemblance to the goods of the description which they undertook to carry, it seems to me that the company should be held to have lost the goods In *Asfor and Co* v. *Blundell* [2] Lord Esher gave this meaning of the term "loss": "The nature of a thing is not necessarily altered because the thing itself has been damaged; wheat or rice may be damaged, but may still remain the things dealt with as wheat or rice in business. But if the nature of the thing is altered and it becomes for business purposes something else so that it is not dealt with by business people as the thing which it originally was the question for determination is whether the thing insured, the original article of commerce, has become a total loss. If it is so changed in its nature by the perils of the sea as to become an unmerchantable thing, which no buyer would buy and no honest seller would sell, then there is a total loss." Although the learned Master of the Rolls was dealing with the case of an article carried by sea, I do not see why the definition of the term 'loss' should not be utilised in cases of other carriers. In *Hearn* v. *The London and South Western Railway Company* [3] Baron Parke expressed himself to the same effect. In my opinion therefore if it is proved that the article has lost its identity as such it would amount to loss. On the question of the burden of proof the case in *Hirji Khetsey and Company* v. *The Bombay Baroda and Central India Railway Company* [4] lays down that it is the Railway Company that has to show

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[1] (1913) I. L. R. 41 Cal. 576.

[2] (1896) 1 Q. B. 123.

[3] (1879) 10 Exch. 793.

[4] (1914) I. L. R. 39 Bom. 191.

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that there was no loss. But I am not satisfied that in this case the District Munsif has considered the evidence very fully, on this question of loss. I agree that he should be called to return a fresh finding on the question suggested by my learned colleague.

[In compliance with the order contained in the above judgments, the Principal District Munsif of Rajahmundry submitted the following finding.

"I cannot say the bags will be of no value at all. Some of them will be useful even now without patching up; some can be used after patching up, and some are totally useless. I submit the finding in those terms and with those provisoes only."

The court delivered the following—

Judgment:—We accept the finding and allow the petition, dismissing the suit with costs throughout.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE AYLING, AND MR. JUSTICE COUTTS TROTTER.

Yeluchuri Venkatachennaya, and others. *Petitioners* *(*Accused*).

In re.

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Venkatachennaya. *In re.*

Criminal Procedure Code—S. 4—"Trial—Inquiry—Meaning—Chapter VIII—Proceeding under, if a trial," S. 350 (1), Proviso (a) —Applicability to proceeding under Chapter VIII.

Held, by the Full Bench that S. 350 (1) proviso (a), Criminal Procedure Code, applies to a case under S. 107, Criminal Procedure Code.

Per *The Chief Justice*, "Trial" generally means the determination of the issues arising in the particular case. In a case under S. 107 Cr. P. C. an issue undoubtedly arises between the Crown and the accused as to whether he should be dealt with under the sections of the Code, and the determination of that issue is a trial."

Per *Ayling, J.* :—The word "trial" as used in the Criminal Procedure Code presupposes the idea of an "offence" as defined in S. 4 of the Code. No "offence" is involved in an inquiry under Chapter VIII of the Code ; inquiries under that chapter are not trials; and the proviso to S. 350 (1) of the Code does not apply "Suo Vigore" to such proceedings. S. 117 (2), however, attracts proviso (a) to S. 350 (1).

Per *Coutts Trotter, J. Quaere* whether a proceeding under S. 107, Cr. P. C. is a "trial".

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* Cr. R. C. No. 677 of 1919. 20th February, 1920.
(Cr. R. P. No. 575 of 1919).

S. 117 of the Code requires the whole of the procedure in a summons or warrant case respectively to be adopted by the tribunal which enquires into a security case. The right of the accused to have the witnesses recalled is not a substantive right but a right relating to the procedure to be adopted, and the accused has that right in a security as in a summons or warrant case.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order dated 24th July 1919 of the District Magistrate of Kurnool in Criminal Appeal No. 4 of 1919, perferred against the order dated 2nd May 1919 of the Court of the Deputy Magistrate of Markapur in Miscellaneous Case No. 13 of 1918.

The court (Abdur Rahim and Spencer, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Abdur Rahim, J.

Abdur Rahim, J. :—In this case the question of law raised before us is whether proviso (*a*) to S. 350 of the Code of Criminal Procedure applies to a proceeding under S. 107.

The petitioners were bound down to keep the peace by a Magistrate who did not hear the evidence, the evidence having been recorded by another Magistrate who has been subsequently transferred. An application was made for recalling the witnesses and for the evidence being taken *de novo.* That application was refused. We are asked to consider whether the petitioners were not entitled under proviso (*a*) to S. 350 to have the witnesses re-summoned and re-heard.

It is not disputed that the main part of S. 350 does apply to this case. But what is contended is that its application to a proceeding under S. 107 is by virtue of the word "enquiry" used in S. 350 and that proviso (*a*) does not apply because it cannot be said that in a case like this any *accused* person is *tried.* The contention of the Public Prosecutor is that this is an enquiry and not a trial within the meaning of S. 350.

There is no direct ruling on the point under S. 350 of the present Code of Criminal Procedure though under the old code it was held that such a proceeding was a trial in the preent connection. There are rulings to the effect that a person who is proceeded against under Chapter VIII is an accused person within the meaning of the Code of Criminal Procedure. For instance *Jhoja Singh* v. *Queen Empress* [1] (Ghose and Rampini, JJ.); *Queen Empress* v. *Mona Puna* [2]; *Queen Empress* v. *Mutasaddi Lal* [3]; *Hopcroft* v. *Emperor* [4]. There is also a decision of this Court that the words "order in a criminal trial" in Clause 15 of the Letters Patent comprehends an order passed by a single Judge of this Court in a proceeding under the provisions of Chapter VIII. See *In the matter of Ramaswamy Chetty* [5]. There can be no doubt that in S. 350 and in other sections of that chapter and several of the succeeding chapters the words 'enquiry or trial' when used in juxtaposition to each other are intended to mean two different things. Nor can there be any doubt that the word 'enquiry' is often used in several places in the general popular sense of investigation into the truth of any matter; see, for instance, S. 177 where it is said "Every offence shall ordinarily be enquired into and tried by a Court within the local limits of whose jurisdiction it was committed". There are also many other sections in which the word 'enquiry' is used in that popular sense. 'Inquiry' is defined in S. 4 (*k*) as including every inquiry other than a trial conducted under this Code by a Magistrate or Court; but 'a trial' is not defined. The question in this connection would be whether a proceeding under S. 107 of the Code of Criminal Procedure cannot properly be called 'a trial' within the meaning of S. 350 (*a*). This very definition shows that the word 'inquiry' has a wider significance which would ordinarily include trials but when used in a technical sense it is to be taken to exclude "trials".

If we examine the scheme of the Code of Criminal Procedure it seems to me to be apparent that wherever the words 'enquiry' and 'trial' are used in two distinct senses, by 'enquiry' the legislature mostly refers to enquiry into cases triable by the Court of Session or the High Court and sometimes also enquiries such as under Chapter XII (enquiry into disputes as

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[1] (1896) I. L. R. 23 Cal. 493.
[2] (1892) I. L. R. 16 Bom. 661.
[3] (1898) I. L. R. 21 All. 107.
[4] (1908) I. L. R. 36 Cal. 163.
[5] (1903) I. L. R. 27 Mad. 510.

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to immoveable properties) which cannot be called 'trials.' Chapter XVIII is the chapter which deals with 'enquiries' into cases triable by a Court of Sessions or High Court. Chapter XIX deals with the form of charges, Chapter XX with the trial of Summons Cases by Magistrate, and XXI with the trial of Warrant Cases. Chapter XXII deals with summary trials and XXIII deals with trial before High Courts and Courts of Session. Then we come to Chapter XXIV which contains S. 350. That chapter is headed "General provisions as to enquiries and trials." Chapter XXV deals with the mode of taking and recording evidence in enquiries and trials. We find in S. 353 that "all evidence taken down under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader". That does not go beyond Chapter XVIII which deals with enquiries in cases triable by the Court of Sessions or High Court. S. 356 throws considerable light on the question. It says that 'in all other *trials*' before Courts of Session and Magistrates other than Presidency Magistrates, and in all *enquiries* under Chapters XII (disputes as to immoveable properties) and XVIII (cases triable by the Court of Session or High Court) the evidence of witnesses shall be recorded in a particular manner. If this section applies to proceedings under Chapter VIII—and there can be no doubt that it does—then a proceeding under S. 107 is a trial within the meaning of the Code. Chapter XXVI deals with judgments. As regards Chapter VIII, it is in part IV, which deals with prevention of offences; and I do not find that in that chapter the word 'enquiry' is used in any technical sense as contra-distinguished from trial. In fact, as I have already pointed out, it is in Chapter XVIII that the word "enquiry" is used in a strictly technical sense as distinguished from trial, that is to say, the Magistrate is to enquire into the cases dealt with there but is not empowered to dispose of them finally; he has to record the evidence and if he thinks there is a *prima facie* case he is to commit it to the Court of Session or High Court for trial. It seems to me therefore that there is no warrant for holding that the word 'trial' as used in S. 350 (*a*) is not intended to cover cases under S. 107.

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But even apart from that, I think that Section 117 makes it quite clear that Section 350 including Proviso (*a*)—I am somewhat doubtful about Proviso (*b*) because of the use of the word 'conviction' there—is made applicable to a proceeding under Section 107. Section 117 says that an enquiry as to the truth of the information—it is evident that the word 'enquiry' here is used in the popular sense—"shall be made as nearly as practicable, where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in Summons Cases; and where the order requires security for good behaviour, in the manner hereinafter prescribed for conducting trials and recording evidence in Warrant Cases, except that no charge need be framed." It is argued by the learned Public Prosecutor that Section 117 clause (2) refers only to Chapters XX and XXI which are headed "Trial of Summons Cases by Magistrates" and "Trial of Warrant Cases by Magistrates" and that none of the other succeeding chapters are referred to in Section 117. The argument in support of this contention is, I take it, that those chapters specifically refer to trials of summons and Warrant cases. But I am unable to accept this argument. Those two chapters deal only with certain limited and special questions of procedure relating to Summons and Warrant Cases. There can be no doubt that many of the general provisions of Chapter XXIV, would apply to proceedings under Section 107 and similar other proceedings under Chapter VIII. But it is said that this is so because both the words 'enquiry' and 'trial' are used and according to the contention for the prosecution a proceeding under Chapter VIII is an enquiry and therefore the provisions of Chapter XXIV are made applicable by force of that word. But it is difficult to see any force in this argument in the face of the express and clear language of Section 117.

Chapter XXIV contains many provisions which must necessarily apply to proceedings under Chapter VIII. For instance Section 344 which gives power to the Court to postpone or adjourn proceedings, Section 340 which says that "Every person accused before any Criminal Court may of right be defended by a pleader" and Section 341 which lays down the procedure to be observed in cases where the accused does not

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understand the proceedings. The Code of Criminal Procedure must be taken to be exhaustive so far as the procedure to be observed by the Magistrates and other Criminal Courts in the various proceedings under that Code is concerned and must be expected to provide for all cases in the proceedings under the Code where the evidence was heard and recorded by a Magistrate and that Magistrate is subsequentlytra nsferred. That is provided by Section 350 and there is the other provision for such contingencies.

Section 117 says that where a matter is inquired into under Chapter VIII the inquiry shall be made as nearly as may be practicable in the manner hereinafter prescribed for conducting *trials* (*and not inquiries*) and recording evidence in Summons Cases. Section 350 proviso (a) lays down what is to happen when the Magistrate who recorded the evidence is no longer exercising jurisdiction in cases where an accused is under trial. That obviously applies both to Summons and Warrant cases. Section 117 thus by explicit language embodies the proviso of Section 350 proviso (*a*).

It was suggested that the provision that an inquiry shall be made in the manner hereinafter prescribed etc., does not refer to a rule of procedure to be observed but to something else. I must say that I do not quite understand this contention but so far as I could follow it, it seems to be utterly untenable. Section 117, clearly refers to the procedure to be observed in cases under Section 107 and other similar sections of Chapter VIII. Therefore even if it were granted—I have shown that this contention is not correct—that a proceeding under this chapter is an enquiry as contra-distinguished from a trial, I should still hold without any hesitation that the procedure prescribed in Section 350 (a) is expressly adopted by the legislature for the purposes of proceedings under Chapter VIII as Section 117 says that the enquiry shall be made in the manner prescribed for conducting trials.

If we look at the provisions of Chapter XXV which refers to the mode of taking and recording evidence in inquiries and trials the position seems to be equally clear. Similarly the chapter relating to " judgment " shows that all the general provisions, as far as practicable, have to be applied in cases

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under Chapter VIII. I have, therefore, upon an examination of the Code arrived at the conclusion that Section 350 proviso (a) applies to a proceeding under Section 107.

A ruling of the Calcutta High Court was brought to our notice in which it was held with reference to Section 350 that a proceeding under Section 145 of the Code of Criminal Procedure is an enquiry and therefore Section 350 would apply. That is the case of *Anu Sheikh* v. *Emperor* [1]. Then it must be pointed out that in that case no question arose of the application of Clause (a) of Section 145, and it could hardly be contended that in such a proceeding there is any person who can be called " accused" nor is there any provision like that of Section 117 in Chapter XII. I might also point out that Section 340 of the Code of Criminal Procedure has been applied to a proceeding under Chapter VIII; (see *Jhoja Singh* v. *Queen Empress* [2]). Section 443 has been applied to such a proceeding in *Hopcroft* v. *Emperor* [3], and Section 437 in *Queen Empress* v. *Mutasaddi Lal* [4]. I would hold, therefore, that the petitioners were entitled to ask in this case that the witnesses should be re-summoned and re-heard, and I would direct that the order of the Magistrate be set aside and the case be remitted to him for further enquiry, the petitioners being given an opportunity to have the witnesses re-summoned and re-heard before the trying Magistrate.

But my learned brother takes a different view. The question of law involved is however one of some importance and should be settled by a Full Bench. The question is ' whether Section 350 (1) Proviso (a), Criminal Procedure Code, applies to a case under Section 107, Criminal Procedure Code.

Spencer, J.

Spencer, J.—This petition is to set aside an order made by the District Magistrate of Kurnool refusing to cancel the bonds taken from the petitioners by the Deputy Magistrate, Markapur for security for keeping the peace. The Deputy Magistrate who held an enquiry under Chapter VIII of the Criminal Procedure Code passed an order requiring the petitioners to execute bonds to keep the peace upon evidence partly recorded by his predecessor. The question which has been argued before us is

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1. (1909) I. L. R. 37 Cal. 812.
2. (1896) I. L. R. 23 Cal. 493.
3. (1908) I. L. R. 36 Cal. 163.
4. (1898) I.L. R. 21 All. 107.

whether Section 350 of the Criminal Procedure Code gives a person against whom such proceedings are being taken a right to demand that the witnesses already examined should be re-summoned and re-heard when the Magistrate who first enquired into the case is transferred before the conclusion of the enquiry. Chapter XXIV of the Criminal Procedure Code deals with general provisions as to enquiries and trials, and Section 350 which occurs in this chapter, undoubtedly applies to proceedings for taking security to keep the peace as it in terms refers to 'enquiries' or trials. But proviso (*a*) runs thus: "In any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-resummoned and re-heard." If it was intended that this provision should apply to enquiries also, one would expect that the words used would be 'In any enquiry or trial' as those are the words used in the body of the section. It was held in *Anu Sheikh* v. *Emperor* [1] that S. 350 would apply to enquiries under S. 145. But there is no authority for saying that the person called upon to show cause against giving security has an inherent right to insist under proviso (*a*) to that section on re-calling witnesses except the case of *Baroda Kant Roy* v. *Korimuddi Moonshe* [2] which is under the Code of 1872. The learned Judges therein observe that an order directing a person to give security is in substance a conviction. With great respect I am unable to agree with that proposition. According to the strict letter of the proviso to S. 350 it is only in trials that the accused can demand a re-hearing of witnesses. Although a trial is not defined in the Code there is a definition of an enquiry in S. 4 (k) which is said to include every enquiry other than a trial conducted under this Code. Wherever the word 'trial' occurs in the Code of Criminal Procedure it appears to refer to proceedings in which an accused person stands before a Judge or Magistrate who is empowered to convict him upon a charge of an offence committed by him and to sentence him to one of the punishments described in Chapter III of the Indian Penal Code. Schedule II of the Code of Criminal Procedure provides by what Magistrates offences may be tried and Schedule III empowers certain Magistrates to try offenders. But, when the schedule speaks of

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[1] (1909) I. L. R. 37 Cal. 812.

[2] (1879) 4 C. L. R. 452.

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enquiries under the preventive sections of the Code it refers to them as powers to require security for good behaviour or for keeping the peace. I therefore consider that the word 'trial' in proviso (*a*) to S. 350 does not include an enquiry with a view to requiring security to keep the peace. There is a decision of this High Court in *Palaniandi Goundan* v. *Emperor* [1] which I am prepared to follow, that proviso (*a*) to S. 350 applies only to trials and not to enquiries. The learned Judges were dealing there with a preliminary enquiry prior to commitment and not to an enquiry under any other chapter than Chapter XXIII. But 'enquiry' in the body of S. 350 is not limited to enquiries preliminary to commitment but also includes enquiries in miscellaneous matters under Chapters VIII. X, XI and XII, that is, to proceedings regarding security to keep the peace or for good behaviour, to suppress public nuisances, to determine disputes regarding immoveable property likely to cause a breach of the peace, as well as to a preliminary enquiry under S. 476 before sending a case for enquiry or trial to a 1st Class Magistrate for an offence against the administration of justice. For this we have the high authority of Mr. Prinsep (see his commentary on the Code of Criminal Procedure). If it was intended that the provision should only apply to certain enquiries and not to others, it would have been easy to specify the kind of enquiries intended to be covered by words of the provision. On the other hand in proviso (*a*) the word 'trial' seems to be used in clear contra-distinction to the words 'an enquiry or a trial' in the body of the section.

A suggestion has been made by my learned brother that by S. 117 of the Code of Criminal Procedure which directs that enquiries relating to security for keeping the peace should be made in the manner prescribed for conducting trials in Summons Cases, and proceedings in cases of requiring security for good behaviour should be conducted in the manner prescribed for conducting trials in Warrant Cases, all other provisions in the Code which apply to trials wherever they occur will be attracted to and will govern enquiries regarding security for keeping the peace or for good behaviour, as if they were trials. In my opinion the provision in S. 117 (2) refers only to the procedure laid down in Chapters XX and XXI respectively for the trial of Summons and Warrant Cases. The general provisions in Chapters XXIV and XXV no doubt apply to proceedings under Chapter VIII but they do so of their own force and not because they contain rules of procedure for the trial of Summons and Warrant Cases by virtue of S. 117 Cl. 2. This very S. 117 refers to proceedings for requiring security as enquiries, and thus observes the distinction between an enquiry and a trial. In *re Adur Desikachari*.[1] it has been observed that proceedings under this chapter fall within the scope of an enquiry rather than a trial. We held in that case that for the purpose of the Madras Letters Patent they would come under the description of a criminal trial. But that decision was independent of the words of definition in the Criminal Procedure Code and had only to do with the words that occur in the Madras Letters Patent.

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[1] (1908) I. L. R. 32 Mad. 218.

I am therefore of opinion that the District Magistrate was right in holding that the petitioners had no inherent right to require a re-trial of the case. I also think that we have no power to order a re-trial under proviso (*b*) to S. 350 as there has been no conviction of an accused within the meaning of that proviso.

In my opinion, apart from the merits of the application into which we have not entered, the Criminal Revision Petition should be dismissed. I agree that the question of law may be referred to a Full Bench.

A. S. Viswanatha Aiyar, for the Petitioners.

The Public Prosecutor, on behalf of the Crown.

The Court expressed the following

Wallis, C. J.

Opinion :—*The Chief Justice* :—I agree with the opinion of Ayling and Coutts-Trotter, JJ., which I have had the advantage of reading, as to the effect of the proviso to Section 350 read with S. 117, and will only add that in my opinion trial generally means the determination of the issues arising in the particular case. As pointed out in The History of English Law by Pollock and Maitland, Vol. II, page 598, the word

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[1] (1914) 28 M. L. J. 307.

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trial comes from the French *trier*, Latin *tritare*, and was first used of the testing or trial of challenges to jurors. Triers of challenges are still appointed when necessary in English criminal trials. Though we talk of the trial of persons what are really tried both in Civil and Criminal cases are issues. An ordinary criminal trial in England is, in the language of the common law, a trial of the general issue joined between the Crown and the accused on the latter's plea of 'not guilty' of the charge preferred against him. See Archbold Criminal Pleading, Ch. 4, S. 5. "The general issue" page 161, 25th Edn. On the other hand, the preliminary Magisterial inquiry which is of comparatively modern origin, forms no part of the trial. I think the framers of the Code had this distinction in mind when they framed the definition of 'Inquiry' so as to exclude 'trial.' In the present case an issue undoubtedly arises between the Crown and the accused as to whether he should be dealt with under the sections, and I see no sufficient reason why the determination of that issue should not be regarded as a trial.

Ayling, J.

Ayling, J. :—The question referred to us is as follows :— "Whether Section 350 (1) proviso (*a*) Criminal procedure Code, applies to a case under Section 107, Criminal Procedure Code."

The proviso in question refers only to a " trial" while the principal clause refers to "an inquiry or a trial." The difference is significant; and points irresistibly to the conclusion that the legislature intended to distinguish between an inquiry and a trial and to direct that, while the principal clause would apply to both, the proviso should only apply to a "trial." What, then, is a " trial?" It is curious that the phrase is not defined in the Code, although it is explained in Section 4 that the term "inquiry" includes every inquiry other than a trial "conducted under this Code by a Magistrate or Court." It looks as if the framers of the Code regarded the word " trial" as of such obvious significance as to require no definition. At the same time it is noticeable that in many sections of the Code the words "inquiry" and "trial" are used in close juxtaposition and apparently intended to signify two different things. I can find nothing to support the idea that either is ever used in any general or popular sense; for instance the words " inquired into" in Section 177, which has been referred to seem to me intended to direct that not only the trial of a Sessions Case, but the preliminary inquiry under Chapter XVIII shall ordinarily take place before a Court having territorial jurisdiction. In the absence of express definition we can only look at the various sections of the Code in which the word" trial" is used, and I can find none in which it is not used in connection with proceedings in which a person stands before a Court empowered to convict him of some "offence" alleged against him. The word" trial" as used in the Criminal Procedure Code seems to presuppose the idea of an offence—a word defined in section 4. No "offence" is involved in an enquiry under Chapter VIII of the Code; and in my opinion, inquiries under that Chapter are not trials. It follows that the proviso to section 350 (1) does not apply" *suo vigore*" to such proceedings.

There remains, however, the argument that it nevertheless applies by virtue of the provisions of the second clause of section 117 Criminal Procedure Code, which runs thus:—

" S. 117 (1) When an order under section 112 has been read or explained under section 113 to a person present in Court or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

(2) Such inquiry shall be made, as nearly as may be practicable where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases ; and, where the order requires security for good behaviour, in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed."

It is argued on behalf of the Crown that the effect of clause (2) is merely to render applicable the provisions of chapters XX and XXI of the Code which deal with the procedure in summons and warrant cases respectively, and those of Chapter XXV in so far as they deal with the mode of taking and recording evidence in such cases. On behalf of petitioner

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it is contended that the clause attracts the provisions of all sections of the Code, wherever found, which are applicable to summons and warrant cases: and, in fact, places a person called on to show cause why he should not furnish security in exactly the same position (except as regards the framing of a charge) as a person tried in a summons or warrant case as regards the procedure to be followed and the privileges to be enjoyed by him in connection with the proceedings.

I must confess to great difficulty in the interpretation of this clause. It is certainly true that if the intention of the legislature had been that ascribed to it on petitioner's behalf, apter language might have been employed; and the specific reference to the mode of recording evidence is somewhat significant of a limitation of the attractive power of the section. On the other hand it would have been perfectly easy to specify Chapters XX, XXI and XXV, if the framers of the Act had only these in mind. I am not much impressed with the argument based on the fact that certain other sections of the Code have been held applicable to inquiries under Section 117, *e. g.* sections 340, 341, 344, 443 and 437. Sections 341 and 344 apply *"proprio vigore"* to inquiries as well as trials. Sections 340, 443 and 437 have been held applicable in *Jhoja Singh* v. *Queen Empress* [1], *Hopcroft* v. *Emperor* [2] and *Queen-Empress* v. *Mutasaddi Lal*, [3], but on a totally different ground —the true meaning to be attached to the word "accused"—not by any reference to section 117.

It seems to me that the words of the clause may be held to cover anything which has to do with the procedure in the Magistrate's Court, and that the right to have the witnesses resummoned and reheard conferred by section 350 is as much a matter of procedure as the right to have prosecution witnesses recalled and cross-examined conferred by section 256. On the other hand if they are to be given the narrow interpretation contended for by the Crown, such provisions as those in Chapter XXVI regarding judgments will not apply to security cases. That is to say, the Magistrate in ordering security under section 118 either for good behaviour or keeping the peace would be

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[1] (1896) I. L. R 23 Cal. 493.
[2] (1908) I. L. R. 36 Cal. 163.
[3] (1898) I. L. R. 21 All. 107.

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under no legal obligation, *inter alia*, to record a judgment setting forth his reasons (section 367) or to give accused a copy of it without delay (section 371). So far as I can see, apart from the operation of section 117, the Magistrate might simply record an order requiring the execution of a bond, without recording any reasons or discussing the evidence. I do not think this could have been intended, especially as care has been taken to provide for an appeal against an order for security for good behaviour (*Vide* section 406), and for the interference of the Chief Presidency or District Magistrate in either class of cases (section 125), for reasons to be recorded. The sections in Chapter XXVI certainly apply "*proprio vigore*" only to trials; but the words "offence (if any)" in clause (2) of section 367 are very curious, and suggest that the framers of the section may have had in mind the fact that they were indirectly applicable to inquiries under Chapter VIII by reason of the clause under consideration.

After the best consideration I can give the matter, I am inclined to think that section 117 (2), Criminal Procedure Code, does attract proviso (*a*), section 350 (1); and would answer the reference in the affirmative.

Coutts Trotter, J.

Coutts Trotter, J :—The question referred to us is whether section 350 (1) proviso (*a*), Criminal Procedure Code, applies to a case under section 107, Criminal Procedure Code.

The petitioners in the case were bound over to keep the peace under section 107, Criminal Procedure Code, by a Magistrate who did not hear the evidence which had been heard and recorded by his predecessor who was transferred before its final determination. The petitioners claimed under the proviso to section 350 to have the witnesses resummoned and reheard by the Magistrate who passed the final orders and their application was refused. They applied in revision to the High Court and the learned Judges, Abdur Rahim and Spencer JJ., differed. They referred the question to this Full Bench.

Section 350 provides for a Magistrate who takes up a part-heard case acting on the evidence when wholly or in part recorded by his predecessor and the general part of the section enables him to do so in an 'inquiry' or 'trial' but the proviso

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only enacts that in any 'trial' the accused may have the witnesses recalled. The contention on behalf of the crown is that the scheme of the Code is to divide magisterial proceedings into 'inquiries' and 'trials' and the latitude given to the accused is confined designedly to 'trials' and that 'inquiries' are excluded from its application. The next step in the argument is to show that proceedings under section 107 and the following sections are inquiries and not trials. The sections undoubtedly speak of an 'inquiry'—See sections 117, 118 and 119.

The first contention of the petitioners is that the word 'inquiry' is used in the Code in two senses, a narrower and technical sense and a more general one. The narrower one is defined in section 4 (*k*) as follows:—

"Inquiry" includes every inquiry other than a trial conducted under this Code by a Magistrate or Court." A typical instance of such an inquiry is the preliminary inquiry held by a Magistrate previous to committal for trial by a higher Court. It can hardly be contended that the right conferred by the proviso to section 350 could be successfully claimed in that case. It is said that 'inquiry' is used in a more general sense,—investigation into the truth of any matter —in S. 177 and the following sections where the language used is "Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed." But those sections are not incapable of meaning that the preliminary inquiry before trial and the subsequent trial after committal should both be within the limits of jurisdiction of each Court in respect of it. It is further urged that the word 'trial' should be regarded as being used where the context requires it in a general and popular sense. It is quite true that the word 'trial' is not defined in the Code but it may not unreasonably be urged that the definition of 'inquiry' impliedly defines 'trial' as every proceeding which is not an inquiry.

The question is whether we are bound to confine ourselves to the four walls of the Code taking the nearest approach we can get to a definition, express or implied, and apply it rigidly, or whether we are at liberty to supplement the Code by an application of the principles that lie at the root of the administration of criminal law. In interpreting an English criminal statute there would be no difficulty: it is always subject to the general principles of the Common law unless they are excluded by the plain words of the statute. The history of the doctrine of *mens rea* and its application to various statutes is a familiar example. If we adopt such a procedure here, there could hardly be any doubt that the proceedings under section 107 and the cognate sections have all the features of a trial. A person against whom they are taken has repeatedly been held to be an accused within the meaning of the Code though he is not expressly so described. He has been held to have the right to be professionally represented and if he cannot be said to be 'charged' with an offence, it is at least sought to be proved against him that he is a person with criminal or undesirable propensities. Finally the consequences to him, if he neglects or is unable to furnish security, are so serious as to entail loss of liberty for a very considerable period. On the other hand, the history of the various Codes and the circumstances of those Codes unquestionably show that the framers of them intended them to be complete in themselves.

Besides these general considerations it may be argued that the contrast between the body of section 350 which expressly mentions both inquiry and trial and the proviso which speaks exclusively of trial is indicative of the intention to use trial as excluding inquiry which can properly be or is described as an inquiry within the meaning of the Code. This comes back to the original argument that inquiry must be construed as used in a non-technical and popular sense in S. 107 following, because if " inquiry" there is used in the technical sense by S. 4 it excludes *ex vi termini* the idea of its being also a trial since an inquiry is in effect defined as that which is not a trial. No doubt if manifest absurdity or injustice ensued from treating 'inquiry' in any particular context as being used in the technical sense, the Court would feel itself at liberty to assume that the word is used in a looser and more popular sense. For reasons presently to be stated I am of opinion that it is not necessary to decide this question or to determin whether to deprive the accused of the right of having the

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evidence reheard by the Magistrate who is to determine his fate is so flagrantly oppressive as to call for the construction of the word 'inquiry' in the material sections in a different sense from that defined in the Code. For by section 117 it is enacted that "such inquiry shall be made, as nearly as may be practicable where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons cases; and, where the order requires security for good behaviour in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases, except that no charge need be framed." It is argued that this only incorporates Chapters XX and XXI of the Code which contain specific provisions applicable only to summons and warrant cases respectively. But the Code contains many general provisions to be found outside these two chapters which regulate matters of procedure in summons and warrant cases alike, such as the directions as to the manner in which evidence shall be received and recorded, the right of the accused persons to be legally represented and the like. I think the true interpretation of section 117 is that it requires the whole of the procedure in a summns or warrant case respectively to be adopted by the tribunal which inquires into a security case. It is an essential part of that procedure to make provision for the contingency, common to all, of a case coming in the first instance before one Magistrate and afterwards before its conclusion before another. I am of opinion, therefore, that the accused has the same right to have the witnesses recalled in a security as in a summons or warrant case; for that is not a substantive right but a right relating to the procedure to be adopted. Accordingly I answer the reference in the affirmative.

A S. V.

PRIVY COUNCIL.

PRESENT:—LORD SHAW, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

[On appeal from the High Court at Bombay.]

Haridas Ranchordas and another ... *Appellants* *

v.

Mercantile Bank of India, Limited. ... *Respondents.*

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Haridas Ranchordas
v.
Mercantile Bank of India Limited.

Interest—Method of calculation may be fixed by long standing practice of parties —Implied contract to pay interest in accordance with such practice—written contract will not exclude proof of implied agreement not inconsistent with its terms—Indian Evidence Act (Act I of 1872) S. 92.

The appellants had for many years been allowed to over-draw their account with the respondent Bank. The Bank in fact charged them compound interest with monthly rests and such charge appeared on the face of their pass books. The appellants annually gave the Bank a letter in a printed form in which they merely agreed to pay interest on the daily balances.

Held that S. 92, of the Indian Evidence Act did not prevent the Bank from proving an agreement by the appellants to pay compound interest with monthly rests, and that such an agreement could be implied from the appellant's long acquiescence in such a method of calculation.

Appeal from a decree of the Bombay High Court, affirming a decree of Macleod J.

The facts of the case sufficiently appear from their Lordships' judgment, where also the material parts of the printed letter signed by the appellants are set out.

Macleod J. decreed the Bank's claim for Rs. 36, 427 due upon a balance of account, and dismissed the respondents' counterclaim for damages for the dishonour of two cheques. With reference to the amount charged for interest the learned Judge observed:

" It was contended that the Plaintiffs are not entitled to charge compound interest. Now there is not the slightest doubt that the Defendants knew that the Plaintiffs were charging compound interest and agreed to that interest being charged in that way with monthly rests. And the only question is whether when the Plaintiffs are suing on the accounts they can ask the Court to give them interest calculated in that way considering the terms of the letter of hypothecation. Clause 2 of that letter merely gives the rate at which interest will be charged: and if the case had stopped there interest would run in law at that rate perhaps with half-yearly rests, certainly with yearly rests. But there is no reason as far as I can see why the plaintiffs should not be entitled to prove that the method by which interest should be charged was not included in the letter of hypothecation. That was arranged orally between the Bank and the defendants. I do not think that Section 92 of the Evidence Act prevents the plaintiffs from proving such an agreement. That Section has always caused me considerable difficulty. But proviso 2 to the Section seems to apply to this case: "The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms may be proved." The document is silent as to the way in which interest should be charged and it is no answer to that to say that if there had been no oral agreement the law would allow interest either simple or with yearly rests. The suggestion that the Plaintiffs are not entitled to charge compound interest after all these years is a very dishonest one, and altogether the attitude taken up by the Defendants at their own suggestion or very likely at the suggestion of their solicitors does them very little credit. No doubt they have suffered like many other people owing to the outbreak of war: but there is no reason why if they have so suffered they should lose all sense of decency."

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* P.C.A. No. 68 of 1919. 28th Oct., 18th Nov. 1919.

Elsewhere in his judgment he characterised the defendants' attempt to reopen the accounts for two years as a most dishonest one, which was only made when they went to their solicitors.

The Appellate Bench of the High Court (Sir Basil Scott, C. J. and Heaton, J.) affirmed this decision. Upon the question of interest Heaton, J. (with whom Scott, C. J. concurred) held as follows:—

"On the question of interest the Defendants have not a clear case at all. The rate was fixed by the contract, but the method of calculation by the long existing practice between the parties."

The case of *Daniel* v. *Sinclair*, 6 A.C. 181 has been relied on as justifying the counterclaim in respect of the compound interest charged. The appellant's case there was differentiated, by the finding from a case of settled accounts between merchants and the rule prevailed that in the absence of express agreement interest as between mortgagor and mortgagee is simple interest only. There was thus in *Daniel* v. *Sinclair* a clear case of mistake on the part of the appellant as to his private rights which may be treated as a mistake of fact.

Here the case is entirely different. The account is between banker and customer to which the security given for overdraft was merely subsidiary; and by long settled fact compound interest was always calculated and accepted without demur.

Hence this appeal.

De Gruyther, *K. C.* and *E. B. Raikes* for appellants submitted that the fact that the appellants' pass books showed that compound

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interest with monthly rests was being charged was immaterial. No agreement to pay such charge could be implied, for proof of any such agreement was excluded by S. 92 of the Indian Evidence Act. In the absence of special agreement simple interest only can be charged, and an account even if longstanding can be re-opened when this rule has been infringed. *Dainel* v. *Sinclair* 1. They further contended that the appellants were entitled to damages for the dishonour of their cheques.

(Their Lordships intimated that they would not call upon respondent's counsel on this latter point).

Wootten (with him *F. Gore-Brown, K. C.*,) for respondent's, submitted that the appellants' acquiescence in the Baulies system of charging interest sufficiently established an agreement on their part to accept that system, and that such agreement might be proved notwithstanding the silence of the written contract. *Bruce* v. *Hunter* 2 *Rufford* v. *Bishop* 3, *Fergusson* v. *Fyffe* 4.

Their Lordships judgment was delivered (November 18, 1919) by

Sir John Edge.

Sir John Edge.—This is an appeal from a decree, dated the 20th November, 1916, of the High Court at Bombay, which confirmed a decree of that Court made in a suit which was instituted in that Court in its ordinary civil jurisdiction on the 27th May, 1915, by the Mercantile Bank of India, Limited, against Haridas Ranchordas, Ludha Dossa, and Bhanji Madhavji. The Mercantile Bank of India, Limited, is the respondent here. Banji Madhavji named as a defendant to the suit, was not served and has, it is said, disappeared. The appellants here are Haridas Ranchordas and Ludha Dossa.

The defendants, under the name of Dharamsay Jaitha and Co., carried on business at Bombay as cotton merchants, their bankers were the plaintiff Bank, and the suit was brought by the Bank to recover from them a balance due by the defendants to the Bank and interest on that balance. The defendants Haridas Ranchordas and Ludha Dossa filed a written statement and counter-claim in which they claimed an account, and damages for the dishonour on the 1st August, 1914, by the Bank of two cheques drawn by their firm upon the Bank. Their Lordships are informed by counsel that by the Rules of

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1. (1881) 6 A. C. 181.
2. (1813) 3 Camp. 467.
3. (1829) 5 Russ. 346.
4. (1841) 8 Cl & F. 121.

the High Court at Bombay relating to suits in its original civil jurisdiction counter-claims are permitted.

The trial Judge ordered that the suit as against the defendant Bhanji Madhavji should stand adjourned, and on the claim of the Bank made a decree against the defendants Haridas Ranchordas and Ludha Dossa, as two of the partners in their firm of Dharamsay Jaitha & Co., and also in their individual capacities, for Rs. 39,025, 10 annas for the debt (including compound interest with monthly rests), with future simple interest from the date of the decree until payment, and by his decree dismissed the counter-claim. The High Court in appeal made a decree confirming that decree of the trial Judge. From that decree of the High Court this appeal has been brought.

The questions now in dispute are (1) was the Bank entitled to charge compound interest with monthly rests on the amounts from time to time overdrawn by the defendants, and (2) was the Bank entitled to refuse to honour the two cheques. To understand these two questions it is necessary briefly to refer to the course of dealing between the Bank and the defendants' firm. For several years, at least from 1906, the Bank had allowed the defendants' firm to overdraw their account. The practice was that annually on the 1st December the defendants, in the name of their firm and individually, signed a letter in a printed form addressed to and given to the Bank, and in accordance with those letters the Bank allowed the defendants' firm to overdraw their account. The last of such letters was given to the Bank on the 1st December, 1913, and so far as it is material it was as follows :—

> "In consideration of your allowing us an overdraft to the extent of, but not exceeding at any one time, Rs. 10 lacs in current account it is hereby agreed that all moneys advanced and hereafter to be advanced in pursuance of these presents (hereinafter referred to as 'the said overdraft' 'or such overdraft') shall be advanced upon the terms and conditions hereinafter mentioned' :—
>
> "1. The said overdraft shall be repayable within twelve months from this date and/ or at your option demand being made therefor.
>
> "2. Interest shall be charged at 7 per cent. per annum and shall be calculated on the daily balance due to you in respect of the said overdraft, till 30th June, 1914 and thereafter till 1st December, 1914, at 5 per cent. per annum.
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> * * * * * *
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> "4. As security for the said overdraft we hereby agree to pledge with you all cotton pressed and unpressed at present stored in your godowons and/ or Jethas and " or which may hereafter be stored by us in your godowns and/ or Jethas.

"5. Notwithstanding anything hereinbefore contained you shall be under no obligation to advance any moneys except against the deposit of cotton by us from time to time as provided by clause 4 hereof, and in no case shall such advances exceed Rs. 10 lacs outstanding at any one time such advances and shall not exceed seventy-four and a half per cent. (74½ per cent) on the net market value of the cotton for the time being deposited in your godowns and/ or Jethas against which cotton such advances shall from time to time be made.

" 6. If at any time a margin of twenty-five and a half per cent. (25½ per cent). on the net market value of the cotton stored in your godowns and/ or Jethas shall not be fully maintained you are to have full right to dispose of the cotton stored in the said godowns and/ or Jethas and apply the proceeds thereof towards making up such margin and/ or claim on us for any such margin and/ or for any balance due in respect of the same after the disposal of the cotton in pursuance hereof.

* * * * * * * * *

" 10. A register shall be kept by you of all cotton deposited in and/ or removed from any godown and or Jetha in pursuance of this agreement, and such register shall be open to our inspection at any time during the usual business hours: no cotton shall be removed from the said godowns and/or Jethas except on a delivery order or orders signed by you.

* * * * * * * * *

Whatever may be the strict construction of Clause 2 of that letter, the Bank invariably struck a balance of its customer's accounts on the last day of each month and charged interest on the amount of that balance. The interest so charged was added to the monthly balance and the resultant balance, which included the interest, was carried forward to the debit of the customer as the balance due on the 1st of the following month. The passbook of the defendants with the Bank shows clearly that that was the way in which interest was computed and charged in their account with the Bank. The defendants never, until after the 1st August, 1914 raised any objection to that principle of charging them compound interest or to compound interest being charged by the Bank on their overdrafts. It was the course of business to which it must be taken that the defendants agreed. As long ago as 1813 Lord Ellenborough in *Bruce* v. *Hunter*, held that the fact that the defendant in that case had not objected to a charge of compound interest in accounts which for several years he had annually received from the plaintiff afforded sufficient evidence of a promise by him to pay interest in that manner. In addition to the evidence afforded by the passbooks to which their Lordships have referred, there is the uncontradicted evidence of the manager

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1 (1813) 3 Campb. 467.

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in Bombay of the Bank that the defendants knew that their account was charged by the Bank with compound interest with monthly rests and had never objected to that course of business.

The trial Judge, on a very careful consideration, found that there was not the slightest doubt that the defendants knew that the Bank was charging compound interest, and agreed to that interest being charged in that way with monthly rests, and made the decree upon the claim against the defendants Haridas Ranchordas and Ludha Dossa which has been already mentioned. He rightly held that Section 92 of the Indian Evidence Act did not prevent the Bank from proving that agreement as to compound interest. The High Court in the appeal taking the same view of the facts as the trial Judge confirmed that decree, and their Lordships agreeing with the findings of the Courts below on the question of interest are of opinion that the decree of the High Court should be affirmed.

The counter-claim relates to the dishonour by the Bank on the 1st August, 1914, of two cheques drawn by the defandants upon the Bank and presented for payment on that day. On the 1st August, 1914, the overdraft of the defendants' firm amounted to Rs. 5,81,454. On the 31st July, 1914, the Bank issued a notice to the defendants' firm that the Bank was not advancing further against cotton and would be obliged by the defendants reducing " the present advance." That notice was not received by the defendants until after office hours on the 1st August, 1914. On that date the Bank held as security for the overdraft cotton which at the market rates at the end of July, 1914, as deduced from the daily circulars of Messrs. P. Chrystal & Co., represented Rs. 8,45,065, or, less the 25½ per cent. margin, Rs. 6,29,574. On the 25 july, 1914, in the cotton market, prices at Bombay began to fall owing to political events in Europe. In their daily cotton report of the 30th July, 1914, Messrs. P. Chrystal & Co., made the following remark:" There is practically no business in the local market pending developments in Europe." In their daily cotton report of the 31st July, 1914, Messrs. P. Chrystal & Co., remarked: The local market is demoralised on account of grave political situation." On the 1st August, 1914, Messrs. P. Chrystal & Co., in their daily

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Haridas Ranchordas v. Mercantile Bank of India Limited.

Sir John Edge.

cotton report remarked, The local market is practically closed. Quotations are only nominal." Those remarks of Messrs. P. Chrystal & Co., were fully justified by the facts then known, and under the circumstances existing on the 1st August, 1914, the realisable value of the cotton then held by the Bank as security for the overdraft was not sufficient to cover the then overdraft; the evidence shows that there was then practically no market. Their Lordships agree with the Courts below that the Bank was justified in refusing to increase the overdraft by honouring the cheques. It is to be observed that the Bank could at any time have demanded repayment of the whole overdraft. It is proved that after the 1st August, 1914, the Bombay cotton market got gradually worse, and that there were very few purchasers of cotton at Bombay during August, 1914, and only in small lots. In August, 1914, there was a large stock of about 500,000 bales of unsold cotton in Bombay. The trial Judge by his decree rightly dismissed the counter-claim and the High Court in Appeal confirmed that decree.

Before concluding this judgment their Lordships think it right to say that they see no reason for questioning the propriety of action of the solicitor for the defendants in the suit.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the costs of this appeal.

Solicitors for Appellants : *Hughes & Sons.*

Solicitors for Respondents: *E.F. Turner & Sons.*

A. P. P.

PRIVY COUNCIL.

PRESENT :—LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE MR. AMEER ALI AND SIR LAWRENCE JENKINS.

[On Appeal from the High Court at Madras.]

P. C.

Venkata Reddi Pantulu Garu v. Rani of Wadhwan.

Chintamanibhatla Venkata Reddi Pantulu Garu and another ... *Appellants.* *

v.

Her Highness Sri Maharani Sri Sitaba Garu, Rani Saheba of Wadhwan ... *Respondent.*

Hindu Law—Alienation by widow—Legal necessity—Burden of proof—Effect of efflux of time.

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* P. C. A. No. 157 of 1917. 17th and 18th November, 1919.

P. C.

Venkata Reddi Pantulu Garu. v. Rani of Wadhwan.

An alienation by a Hindu widow is challengeable on the ground that it was made without legal necessity, (within the limits of the ordinary law of limitation) however long time has elapsed. But when the transaction took place long ago, such full and detailed evidence as to the state of things which gave rise to the sale cannot be expected as in the case of alienations made at more or less recent dates. In such circumstances presumptions are admissible to fill in the details which have been obliterated by time.

Appeal from a decree of the Madras High Court, reversing a decree of the District Court of Vizagapatam.

Ananta Rao, the owner of the estate in suit, died in 1829 leaving a widow Hanumayamma and a daughter. In 1830 Hanumayamma sold the estate to a purchaser from whom the respondent derived title. Hanumayammâ died in 1900 and in 1912, three days before the period of limitation, the present appellants, who were Ananta Row's reversioners, sued claiming the estate on the ground that the sale was without legal necessity and was binding only during the widow's life-time.

The District Judge held that the price was adequate but that legal necessity was not proved to have existed. He observed "This" (whether the sale was for legal necessity) "is the crux of the case. I have been referred to numerous reported decisions with regard to the law on this point; but in the present case I do not think that any legal problem is involved. It is pithily laid down in 33 Calcutta 268 that when the plaintiff has proved that he is the next heir of the husband of the widow alienor and that the defendant is in possession of the property the plaintiff would then be entitled to a decree, unless the defendant then proves that the alienation was justified by legal necessity. To summarize Mayne (Hindu Law, page 884) who, I think, clearly explains the recognized law; granting that there is necessity *i.e.*, actual pressure such as an out standing decree or impending sale a widow is at liberty within a reasonable latitude to sell such part of her property as will meet that necessity."

After dealing with the evidence of necessity, he summed up as follows:

The case therefore resolves itself into this question. Can a widow who, after making the highest possible estimate of her husband's liabilities, has a reasonable prospect of liquidating those debts within 5 years, (and, as the event proved could have liquidated them well within that period) plead legal necessity to sell, or legal justification in selling the reversioner's estate, when she is not being pressed by any process of attachment. I know of no legally accepted definition of 'necessity' which permits of any but a negative answer. Accordingly I find on the 5th issue that the sale was not for legal necessity.

He accordingly decreed the suit. On appeal the High Court (Abdur Rahim and Phillips, JJ.,) reversed this decision. After reviewing at length the evidence as to necessity, the learned Judges observed :

The above facts show that the debts payable including the peishcush already due which would become due on the 10th May entirely covered the value of the property. It is almost certain so far as it is possible to be certain about the state of things which existed in 1835. that the Taluk would have been summarily sold by the Government for arrears of revenue if it had not been sold to Suryaprakasa Row. Under compulsory Revenue sale the property would have fetched something wholly inadequte perhaps only a few hundred rupees. The widow and her daughter would have absolutely nothing left for maintenance and the debts incurred by her husband would have remained undischarged. Under the Hindu Law and religion, it is regarded as the pious duty of a widow to discharge the liabilities of her deceased husband and even the payment by her of debts which had already become barred has been upheld as proper on such grounds (see *Kandasami Mannavan* v. *Rajagopalasami Thevan* [1] which follows *Kondappa* v. *Subba* [2]. But the sale under consideration was a very clear case of actual necessity. By actual necessity it is not to be understood that the widow is bound to wait till she is pressed for payment of her husband's debts or other just liabilities either by the institution of suits or by claimant letters of demand and that she must not take any action until the very last moment. She is not a trustee of the property in the ordinary sense of the word. She is entitled to it in her own right though only to a limited extent. If she finds that the most prudent course to adopt for discharging her just liabilities and for saving what is yet reasonably possible to save is to sell the property, she should be allowed to do so. The law does not compel her in a case where the debts amount to the full value of the property to go on borrowing and struggling on the merest chance that at some distant date, she might be able to realise enough by way of income to discharge the debts. The Law allows her discretion to judge what is the best course of action in the interest of the estate as well as of herself. Even judging her conduct in this case, by the strictest standard, we should hold that the sale of the property was inevitable. By selling it in time she was able to save out of the wreck not only Rs. 1,100 on the interest of which she maintained herself and her daughter but also the house, some maniam lands and certain palmyra topes.

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[1] (1909) 7 M. L. T. 363.

[2] (1889) I. L. R. 13 M. 189.

P. C.

Venkata Reddi Pantulu Garu v. Rani of Wadhwan.

They accordingly allowed the appeal and dismissed the suit.

Hence the present appeal.

De Gruyther, K.C., and *Dube,* for Appellants : The onus was on the respondent to prove legal necessity for the sale, and she has not done so. No doubt after a very long interval of time less evidence may be required, but the burden of proof is not shifted ; moreover in the present case we have documents showing the position at the time of the sale.

(*Upjohn, K. C.,* for Respondent, referred to *Banga Chandra Dhur Bisvas* v. *Jagat Kishore* 1).

In that case there was a deed reciting necessity : there is no such deed here. Even allowing there were debts, there was no need for the widow to sell the whole estate. The District Judge has rightly held that the debts could easily have been paid out of income.

Upjohn, K. C., Sir W. Garth, K. C., and *Parikh* for Respondent were not called on.

Their Lordships's judgment was delivered (November 18, 1919) by

LORD SHAW.—This is an appeal from a decree of the High Court of Madras, dated the 29th February, 1916. It reversed a decree of the District Court of Vizagapatam dated the 7th October, 1914.

The object of the suit, which was by a reversioner, was for the purpose of setting aside a deed of sale, an alienation by a widow: and the pinch of the case, as argued in the Courts below and before their Lordships, is whether that alienation is challengeable on the ground that it is made without legal necessity. The sale took place so far back as the 5th May, 1830. The widow in question survived that sale by no less a period than 70 years, she having died on the 15th December, 1900. The suit in the present case was instituted in the year 1912, within a few days from the expiry of the period of limitation under the statute. It results accordingly that the investigation subsequent to the initiation of the suit in 1912 was an investigation with regard to the circumstances of a transaction more than 82 years after that transaction took place.

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1. (1916) L. R. 43 I. A. 249=31 M. L. J. 563 (P.C.)

P. C.

Venkata Reddi Pantulu Garu
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Rani of Wadhman.

Lord Shaw

In these circumstances their Lordships—the case being singular in these points of date—are moved to repeat as part of their own judgment the following propositions, which represent, in thier view, both the sense as well as the law of the situation so disclosed. In the judgment appealed from the learned Judges of the High Court lay down the law as follows :—

> "It is not disputed that the onus lay upon the defendant to prove the necessity for the sale, but having regard to the great lapse of time since the transaction took place, that is, about 62 years, perhaps the highest on record, it will not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the sale in question as in the case of alienations made at more or less recent dates. In such circumstances, presumptions are premissible to fill in the details which have been obliterated by time."

Their Lordships adopt that statement of the law.

They desire indeed only to add that it is matter of some surprise that so much documentary evidence still remains: and from a perusal of it and the whole proceedings in the case they see no cause to doubt that the decree pronounced by the High Court is one which ought to be affirmed. They have the less reason to doubt this on account of the argument of the appellants presented to the Board, which appears to have exhausted every avenue of attack open to a person challenging an ancient transaction.

Their Lordships will humbly advise His Majesty that this appeal stand dismissed with costs.

Solicitor for Appellants :—*Douglas Grant.*

Solicitors for Respondent :—*T. L. Wilson & Co.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Velu Padayachi *alias* Sadaya Padayachi ...*Appellant** (*3rd Deft.*)
v.
Arumugam Pillai ...*Respondent* (*Plff.*)

Velu Padayachi
v.
Arumugam Pillai.

Limitation Act—Art. 11—Applicability—Sale in execution of money decree—Application by prior usufructuary mortgagee of the same properties for their sale subject to his mortgage—Dismissal on ground of delay—Suit by him for possession against auction-purchaser in execution of money decree—Limitation.

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* A. A. O. No. 177 of 1919. 5th November, 1919.

Velu Padayachi
v.
Arumugam Pillai.

In execution of a simple money decree properties of the judgment-debtor, which had been usufructuarily mortgaged by him to A, were attached and sold and purchased by B. A few days before the sale, however, A applied to have the properties sold subject to his mortgage and asked the Court to have it so stated in the sale proclamation but his application was dismissed as being too late In a suit brought by A against B more than a year after the date of the order dismissing A's application for the recovery of possession of the properties on the strength of the mortgage, *held* that the suit was barred under Art. 11 of the Limitation Act and that it was open to B to raise the plea that it was so barred.

Appeal against the order of the Court of the Temporary Subordinate Judge of Cuddalore dated 19th February 1919 in A. S. No. 217 of 1916 on the file of the District Court of South Arcot preferred against the decree of the Court of the District Munsif of Mannargudi (South Arcot District) in O. S. No. 434 of 1916.

M. Patanjali Sastri, for Appellant.

C. Padmanabha Aiyangar, for Respondent.

The Court delivered the following

Spencer, J.

Judgments :—*Spencer, J.*—The properties in suit were attached and brought to sale in execution of a simple money-decree. After that decree was passed, the judgment-debtor (1st defendant), executed a usufructuary mortgage over them in favour of the second defendant in this suit, who in his turn assigned his mortgage rights to the present plaintiff. When the present plaintiff sued to recover possession of the properties on the strength of the mortgage, an objection was raised by the 3rd defendant, who was the auction-purchaser at the sale in execution of the simple money-decree, that the suit was barred by limitation.

It appears that the plaintiff's assignor applied a few days before the sale to have the properties sold subject to his mortgage and asked the Court to have it so stated in the sale proclamation. The claim was dismissed as being made too late. The date of the order was 24th August, 1911. The present suit was not instituted till 1916 and is clearly out of time if art, 11 of the Limitation Act applies to it. The Subordinate Judge, dissenting from the view of the District Munsif, held that the suit was in time as the mortgagee's application in August 1911 was, in his opinion, directed towards the settling of the terms of the sale proclamation and as such, fell under O. 21 r. 66, of the Code of Civil Procedure, and not under art. 58.

Velu Padayachi v. Arumugam Pillai.

Spencer, J.

The respondent seeks to support the lower Appellate Court's order on the ground that there was no prayer in the application that the attachment should be raised, nor any declaration in the order that the mortgage was no longer subsisting. He further argues that, assuming the order of August 24th was an order upon a claim petition, such an order will only bind those who were parties to it and therefore an auction-purchaser who was not a party to those proceedings cannot take advantage of the fact that the claim was dismissed. I am of opinion that none of these representations and arguments can avail the plaintiff who has come to Court after the period prescribed by law.

In the first place I may say I am not much influenced either by the fact that Exibit I terms itself a claim petition and that the second defendant in three places describes himself in that petition as a claim petitioner, or on the other hand by the fact that the provision of law under which it was presented is given as O. 21 R. 66 of the Code of Civil Procedure. We must look at the substance of the application. It was one to have it recognised by the Court that the property about to be sold was subject to an encumbrance in favour of the petitioner.

The effect of the dismissal of this application was to create a belief in the minds of those who bid for the property that the property was free of encumbrance.

Can the mortgagee or his representative be allowed to ignore the Court's order, to which he was a party, and proceed as if there had been no such proceedings and as if what was sold was an encumbered property ?

I think the dismissal of his application was not a nullity. In *Lakshmana Chettiar* v. *Parasivan Pillai* [1] which followed our earlier decision in *Ponnuswami Pillai* v. *Samu Ammal* [2] it was pointed out that one form of order to be made under the head of investigation of claims and objections in O. 21 of the Code of Civil Procedure is that definitely provided for in Rule 62 which permits a Court to continue an attachment subject to a mortgage in favour of a person not in possession. The learned Judges observed if one particular form of order on the claim on a mortgage can be passed then any claim that relates to an alleged mortgage or the existing liability under a mortgage must be a claim under Rule 58. I think that we should follow the above two decisions of this Court, and that *Ganesh Krishna* v. *Damoo* [1] which was a case of a mortgagee asserting his title in response to a notice of the Court calling for objections to a sale proclamation is distinguishable.

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[1] (1919) 37 M. L. J. 159.

[2] (1916) 31 M. L. J. 247.

The case of *Ayya Pattar* v. *Attupurath Manakkal* [2] may be distinguished on the ground that the application in that case was merely to have certain objections to an auction recorded and did not ask for any order on the merits of the petition.

The Full Bench decision in *Venkatarathnam* v. *Rangayanayakamma* [3] conclusive on the point that an order dismissing a claim petition for delay, delay being one of the grounds under which claims may be dismissed under the proviso to Rule 58, is an order which becomes final against its claimant under Rule 63 unless he files a suit within one year of the order. This disposes of the respondent's first two objections and of the Subordinate Judge's reasoning. As regards the third objection it is obvious that the auction-purchaser is very much interested in obtaining a good title to his purchase and being a party (third defendant) to this suit he can raise any objection such as limitation that may serve as a bar to the maintenance of the suit.

Now that the time has expired for instituting a suit to establish the right that was in effect negatived in the claim proceedings, the question is not one of estoppel or *res judicata* arising out of the former proceedings, but one of limitation. This does not depend, on any nice question of law whether the auction-purchaser represents the mortgagee's or the judgment-debtor's interests after the sale, it is a sufficient answer to the respondent's objection to say that the plaintiff is necessarily bound by the final order on his assignor's claim petition and that any defendant, especially one who is in possession of the property sought to be recovered by the suit, can raise the plea of limitation.

This appeal must be allowed and the District Munsiff's decree restored with costs here and in the lower Appellate Court.

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[1] (1916) I. L. R. 41 Bom. 64

[2] (1919) 52 I. C. 938

[3] (1918) I. L. R. 41 Mad. 985=M L. J. 335 (F. B.)

Sadasiva Aiyar, J.

Sadasiva Aiyar, J.—I entirely agree. An ingenious argument was advanced, namely that because the auction-purchaser is the representative of the judgment-debtor and because the judgment-debtor was not a party to the order on the claim petition, he cannot take advantage of the order on the claim petition when it is passed against the claimant any more than he would be bound by that order if it had been in favour of the claimant; and for this proposition *Vedapalli Narasimham* v. *Dronamaraju Seetharamamurthy* [1] was quoted. In that case and in the cases following it and in the Full Bench case in *Krishnasawami Naidu* v. *Somasundaram Chettiar* [2], which it professes to follow, no sale had taken place on the basis of the order disallowing the claim petition and the only question was whether *as between the claimant on the one hand* and the judgment-debtor on the other, would be bound by the order on the claim petition. But it has never been held that the claimant is not himself bound by the order in favour of the decree-holder disallowing the claim of the former (unless of course, he sets aside the order within one year) and if the court auction purchaser cannot take advantage of that order in favour of the decree-holder the result would be that such an order becomes absolutelyfutile and would have no effect or even evidentiary value as regards the extent of title conveyed under the auction sale to the purchaser therein. In other words the unsuccessful claimant who has not made the Judgment-debtor a party to the claim-proceedings can again put forward his claim against the auction purchaser whether as plaintiff or as defendant. No case has been quoted in which it has been held that such a startling result follows the omission to make the judgment-debtor a party to the claim proceedings. On the other hand, it has been held in several cases that the Judgment-debtor is not a necessary party to a claim proceeding and that the proper parties to such proceeding are the decree-holder and the claimant. Of course, if the judgment-debtor intervenes and actively opposes the claim along with the decree-holder and the claim petition succeeds, he may be bound by the order unless he sets it aside within one year as the order may be then said to be passed against him also. But ordinarily, it is the

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[1] (1907) I. L. R. 31 Mad. 163.

[2] (1906) I. L. R. 30 Mad. 335.

Velu Padayachi v. Arumugam Pillai.

Sadasiva Aiyar, J.

decree-holder's right to bring the property to sale against the claim of the claimant's right to have the property released (or sold subject to the claimant and the claim) which are litigated in such a petition. The auction-purchaser is entitled to take advantage of the order against the claimant in such a case (if it is not set aside by a suit within one year) not because the purchaser is the representative of the decree-holder but because the order which established the right of the decree-holder to bring the property to sale against the claim of the claimant cannot be given effect to otherwise and was clearly intended by the legislature to have the effect of precluding the claimant from putting forward his claim again in opposition to the auction-purchaser at the sale held in pursuance of the order against the claimant. The conclusive establishment of the decree-holder's right to bring the property to sale free from the claimant's alleged encumbrance involves the right of the purchaser at the sale to get a title to the property free from such encumbrance.

I concur in allowing the appeal with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE AYLING.

Subramania Aiyar v. Shaw Wallace & Co., Madras.

T. Subramania Aiyar and another ...*Appellants*[*] (*Defendants Nos. 1 to 3*).

v.

Messrs. Shaw Wallace & Co., Madras ...*Respondent* (*Plaintiffs*).

Principal and surety—Discharge of surety—Conduct of creditor—Hindu Law—Father's personal debt—Liability of sons during life-time of father.

A surety who has bound himself for a person's doing certain things, is not discharged from his liability unless it is shown that the creditor has, by his conduct, either prevented the things from being done or connived at the omission, or enabled the person to do what he ought not to have done or leave undone what he ought to have done, and that but for such conduct the omission or commission would not have happened.

A creditor suing a Hindu for his personal debt, not tainted by immorality or illegality, is entitled to include the sons of the debtor as parties to the suit and to sell the whole ancestral property including the son's share, in execution of the decree. The decision of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* [1] has not altered the previous law in this respect.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Tanjore in Original Suit No. 21 of 1916.

T. V. Muthukrishna Aiyar and *N. Muthuswami Aiyar*, for Appellant.

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[*] A. No. 823 of 1918. 3rd December, 1919.

[1] (1917) I. L. R. 39 A. 437=33 M. L. J. 14 (P. C.)

S. *Varadachariar* and *C. Sreenivasan*, for Respondent.

The Court delivered the following

Judgments :—*Abdur Rahim, J*:—Messrs. Shaw Wallace and Co, merchants of Madras, sued the defendants—appellants on a surety bond executed on the 11th February 1911 by the 1st defendant the father of defendants 2 and 3, all of them being members of a joint Hindu family. The 1st defendant who is a Brahmin land-holder of Mayavaram in the District of Tanjore wanted to do tanner's business but for social considerations, he liked to keep himself in the background and let the business be carried on in the name of a third person. The plaintiff company used on behalf of the tanners to ship their goods to England for sale charging them a commission on the sale proceeds, and in furtherance of such business they advanced moneys to tanners in order that they might buy skins and hides and tan them on the understanding that those goods should be sold in the London market through the plaintiff's agency. They charged interest on such advances and in order to secure their repayment they not only bargained for a lien on the skins which would be bought from time to time by the tanners but also obtained security on immoveable property of the tanners themselves and of other persons as sureties.

The first venture of the 1st defendant, Subramania Aiyar, was in August 1910. That business was carried on in the name of one Harisankar. It turned out to be unsuccessful and was closed in 1911. In connection with that business the plaintiff company have obtained a decree by consent against defendants 1 to 3 for the moneys advanced by them with interest. The business which has given rise to the present claim was started on 11th February 1911 in the name of Visvanatha Aiyar, & Co., the two partners constituting that firm being one Visvanatha Aiyer and the 2nd defendant.

One of the questions raised at the trial was whether the 2nd defendant was not a minor on the 11th February 1911. But it is found by the Subordinate Judge that he was a major and that finding has not been challenged before us. Visvanatha Aiyar was the active partner of that firm and the 2nd defendant, though a major, had no experience in such business and the tannery was carried on, according to the evidence, entirely by Visvanatha Aiyar. Visvanatha Aiyar formally closed that business on 26th May 1911 and the plaintiffs' claim, roughly speaking, is for a sum of Rs. 40,000 which was advanced from time to time to Visvanatha Aiyar & Co., under the agreement, Exhibit B, dated 11th February 1911. The surety-bond which is sought to be enforced in this suit (Exhibit B1) was executed on the same date and as part of the same transaction. Both the agreement with Visvanatha Aiyar & Co. and the surety-bond executed by the 1st defendant refer to each other.

To understand some of the pleas raised in the defence it would be necessary to mention that Visvanatha Aiyar had been carrying on the business of a tanner by himself before the firm of Visvanatha Aiyar & Co., was formed. He first began dealing with the plaintiffs in September 1909. So far as it appears from evidence, he obtained advances from them on terms similar to those contained in the agreement of Visvanatha Aiyar & Co. At the end of 1910 Visvanatha Aiyar's liability arising out of his individual business before the formation of Visvanatha Aiyar & Co., amounted to about Rs. 47,000. The position therefore when Visvanatha Aiyar & Co., consisting of Visvanatha Aiyar and 2nd deft. was started in 1911 was this: Harisankar's business in which the 1st defendant was interested had failed and in connection therewith there was a large claim outstanding against the 1st defendant on the guarantee bond which had been executed by him similar to the one sued upon. The evidence shows that the 1st defendant wanted to set up his son, the 2nd defendant, in the business of a tanner. For that purpose he approached the plaintiffs for recognition and help. But Mr. Menzies who was at that time the representative of the plaintiff firm refused to deal with the 2nd defendant as he was a young man and had no experience in tanning which required considerable skill. He seemed to have recommended Visvanatha Aiyar with whom, as already mentioned, the plaintiffs had had dealings, as a man of considerable skill and experience. The 1st defendant evidently accepted the suggestion with the result that the firm of Visvanatha Aiyar & Co., was started as mentioned above. It may be mentioned that

Visvanatha Aiyar, according to the evidence, was known to the 1st defendant as carrying on the business of a tanner at Trichinopoly though they had no dealings with each other previously.

The main terms of the agreement between the plaintiffs and Visvanatha Aiyar & Co., described therein as tanners are as follows:—The plaintiff company agreed to advance to Visvanatha Aiyar & Co., such sums of money from time to time as they might think fit, with interest at 6 per cent. per annum, but the amount outstanding at any time should not exceed Rs. 50,000 and Visvanatha Aiyar & Co., undertook not to carry on any business other than that contemplated by the agreement and not to give the skins and hides tanned by them to any person other than the plaintiffs. They further agreed that all the skins and hides purchased by them should be hypothecated to the plaintiff company to secure the moneys advanced by them and Visvanatha Aiyar & Co., should be in the position of trustees with respect to the custody of these goods. It was further provided that the plaintiff company were to be entitled to have a representative of theirs at the tannery with power to look into the books of account of the tannery and to inspect the premises whenever he chose and the salary of such representative was to be debited to the tanners' account. All the amounts to be advanced by the firm were to be used solely for the purchase of skins and hides and tanning material and all such purchases were to be paid for in cash and cash bills showing the prices paid and counter-signed by the persons supplying the goods to be sent to the firm at Madras. The tanners were not to purchase goods on credit or to pledge their credit for them to their constituents. Each consignment of the tanned skins and hides to the plaintiff company at Madras was to be accompanied by a certificate showing the value and description of the skins and the quantity and value of the stock in the tannery. The certificate was to be signed by the tanners and by the plaintiffs' representative. The tanners are further to deliver to the firm a certificate of stock every week showing the quantity of goods in the tannery and how far the process of tanning has advanced. The plaintiff firm would be entitled to weigh and examine the goods consigned to them and if they thought fit they might make further advances to the tanners for the purchase of fresh skins. If the tanners committed a breach of any of the terms of the agreement the plaintiffs would be entitled without any notice to terminate the agreement and to call in whatever sums were outstanding and to take possession of the property and effects of the tanners hypothecated under the agreement and also of the 1st defendant under the terms of the bond referred to. But it is provided that the plaintiff firm shall not be bound to take possession of the properties or exercise any of the powers abovementioned and that the firm shall not be liable to the tanners for anything done by them in the exercise of the powers reserved to them provided the same is done in good faith. In addition to the amounts which the firm might advance to the tanners the latter themselves were to find certain sums of money, altogether about Rs. 25,000 to be invested in the business and not to withdraw the same without the consent of the plaintiff company. In order to secure the performance of this agreement the tanners deposited the title deeds of certain immoveable property to the value of Rs. 10,000. The 1st defendant by the surety bond (Exhibit Bl) of the same date and referred to in the agreement guaranteed all payments due to the firm under the agreement up to a limit of one lakh of rupees and agreed to save the firm harmless and to keep the firm indemnified from and against all loss and damage which they might suffer in breach of the terms and conditions of the said agreement by Visvanatha Aiyar and the 2nd defendant or by either of them.

The case of the plaintiffs is that they advanced Rs. 10,000 on the 13th February, Rs. 15,000 on the 21st February, again Rs. 10,000 on the 3rd April and Rs. 5,000 on 19th May 1911 to Visvanatha Aiyar & Co. It was argued that as a matter of fact the advances were not made to Visvanatha Aiyar & Co., but to Visvanatha Aiyar individually. The evidence, however, is clear and conclusive. The counterfoils of the cheques issued by the plaintiffs and the entries in the ledger of the National Bank, the promissory-notes which were executed for each advance and the correspondence which took place at the time all leave no room for doubt that the advances were made to Visvanatha Aiyar & Co. It is also clearly proved that goods were purchased from time to time by Visvanatha Aiyar & Co. of the value of about Rs. 34,000 or Rs. 35,000 altogether. The first cash bill dated 26th February is for goods of the value of Rs. 3,625, the second cash bill dated 20th March is for goods of the value of Rs. 3,834, three cash bills of the date of 2nd May for goods of the value of about Rs. 18,000 and one cash bill of the 17th May for goods of the value of Rs 8,750. It may be taken as a proved fact that the bulk of these goods never reached the plaintiff firm at Madras. They were clandestinely removed from the tannery at Trichinopoly at the instance apparently of Visvanatha Aiyar after the business was stopped, some time in the first or second week of June. It appears that only 1,300 loose skins were all that was found in the tannery.

Under the 9th issue the appellants tried to make out that they were not liable under the surety bond inasmuch as it was obtained by misrepresentation and suppression of material facts relating to the position of Visvanatha Aiyar and the state of his financial dealings with the plaintiffs. It was alleged that in February 1911 Visvanatha Aiyar was unable to meet his liability to the plaintiff which then amounted to nearly Rs. 50,000 and that the plaintiffs in order to realise this amount induced the 1st defendant, to start a tannery with his son, the 2nd defendant, and Visvanatha Aiyar as partners and to stand guarantor with respect to dealings of the partnership with the plaintiff firm. One of the suggestions in this connection was that Visvanatha Aiyar had no goods in stock on his individual account although his liability amounted to Rs. 50,000. But this suggestion is clearly without foundation as the evidence shows without doubt that at the end of 1910 Visvanatha Aiyar's stock belonging to his own individual business was of the value of Rs. 42,000. It was argued that these goods were not his and should be taken to belong to Visvanatha Aiyar & Co. The only basis for this argument seems to be the fact that those goods were not sent on to Madras at once but were consigned to the plaintiff firm in different consignments from January to May 1911. It would appear that in March and April Visvanatha Aiyar was unable to devote much time to his business owing to illness and also because of the death of one Pattammal to whose husband's estate he was entitled to succeed as reversioner. The whole matter is dealt with in the judgment of the learned trial Judge in paragraphs 50 to 58 and the evidence to which he refers amply bears out the conclusion that Visvanatha Aiyar had the quantity of goods mentioned in Exhibit FFFF-10 at the end of January 1911 amounting in value to about Rs. 42,000 and that in addition to this the security of landed property given by Visvanatha Aiyar available to the plaintiffs. It could not therefore be said that Visvanatha Aiyar was in any sense insolvent or unable to meet his liabilities to the plaintiffs or that the plaintiffs had any reasons for apprehending that Visvanatha Aiyar would not be able to repay the advances in due course.

That there were separate accounts with respect to the dealings between the plaintiffs on the one hand and Visvanatha Aiyar and Co., and Visvanatha Aiyar individually on the other is amply clear from the evidence. Exhibit II which is a letter written by the plaintiffs to Visvanatha Aiyar on the 18th February 1911 and in which they point out to him the advisability of restricting his operations as he had been suffering loss and losing money, itself mentions the amount owed by him in his individual account separately from what was owed by Subramania Aiyar, the 1st defendant under the new agreement. Exhibit DD-DD, which is a letter written by Visvanatha Aiyar to the plaintiffs mentions the 'new' account, that is the account of Visvanatha Aiyar and Co, as distinct from his individual account and the account of Harisanker. It was not until 14th July 1911, long after Visvanatha Aiyar and Co.'s business was closed, and when the 1st defendant was called upon by the plaintiffs to make good the loss, that we find him making any suggestion that Visvanatha Aiyar had no stock of his own in December. This allegation was instantly repudiated by the plaintiffs as untrue; they pointed out that the plaintiffs had distinct proof that at the time of the agreement Visvanatha Aiyar had in his tannery stock of goods the value of which would cover the advances outstanding against him. But there is no reason for doubting the correctness of Mr. Menzies' statement that he was not in a fix as to his getting back the money advanced to Visvanatha Aiyar at the time of Exhibit B and that he was not anxious on that account as there was stock from which he could realise the money. There were in addition to the consignments which he had sent home and which were awaiting sale in London on behalf of Visvanatha Aiyar. It may be taken for granted that Mr. Menzies recommended Visvanatha Aiyar as an experienced tanner but it does not necessarily follow that he was under any obligation to disclose to the 1st defendant the state of accounts between him and Visvanatha Aiyar with respect to the latter's individual business. On this point therefore the finding of the learned Subordinate Judge must pe upheld.

Issue 6 raises the question whether Visvanatha Aiyar and Co. carried on any business at all under the agreement. The evidence on this point is abundant and clear that business was carried on by the firm until about the end of May 1911. It may be noticed here that this contention of the defendants is scarcely consistent with the contention that Visvanatha Aiyar had no stock on his individual account and that all the goods were purchased with the moneys advanced to Visvanatha Aiyar and Co.

The question which requires more careful consideration is whether the 1st defendant should be held to have been absolved from liability under the guarantee bond owing to the conduct of the plaintiffs in not insisting on a strict observance on the part of Visvanatha Aiyar and Co. of these conditions of the agreement which, if properly carried out by Visvanatha Aiyar and Co., would have ensured the plaintiffs having in their control and disposition goods sufficient to cover the advances made by them to Visvanatha Aiyar and Co. The plaintiffs are charged with gross negligence of a character implying connivance on their part at the fraud committed by Visvanatha Aiyar in not buying goods to the full value of the advances made to Visvanatha Aiyar and Co and in making away with the goods which were in stock in the tannery of that firm. It is argued that under the agreement the plaintiffs should have seen that cash bills were forthcoming for goods of the value of each advance within reasonable time and no further advances should have been made until the previous advance was fully accounted for, that they ought further to have insisted on weekly certificates being sent on regularly to their office in Madras and that as soon as the plaintiffs in May 1911 had reasons to suspect that Visvanatha Aiyar was not acting in accordance with the terms of the agreement and was not behaving properly they ought to have taken possession of the tannery as provided by the agreement. The plaintiffs it is suggested had reasons of their own for not acting with proper vigilance; that in fact they allowed Visvanatha Aiyar to draw money from time to time on behalf of Visvanatha Aiyar and Co., without caring to see that the moneys were utilised in purchasing skins and that it was in fact their negligence which enabled Visvanatha Aiyar to make away with the stock. The motive for such conduct on the part of the plaintiffs is alleged to be that they expected through the help of Visvanatha Aiyar to secure the skins in the tannery of his relation Pattammal which were pledged to the South Indian Export Company, a rival firm engaged in similar business. A very lengthy argument has been addressed to us on this point and we have come to the conclusion that having regard to the nature of the business the plaintiffs cannot be held to have been guilty of any negligence in their dealings with Visvanatha Aiyar. [His Lordship next deals with the evidence at length.]

The view we take of the facts therefore is that the defendants have failed to prove that the plaintiff company were negligent in their dealing with Visvanatha Aiyar & Co., much less that they connived at Visvanatha Aiyar violating the terms of the contract between the plaintiffs and Visvanatha Aiyar and Co., or misappropriating the moneys advanced on the goods belonging to Visvanatha Aiyar and Co. It might be that the plaintiffs would have acted more in accordance with the letter of the contract, Exhibit B, if after making the initial advance they had refused to make any further advances unless and until they received cash bills showing that the moneys already advanced had been utilised in the purchase of skins and the skins so purchased were in the tannery or were consigned to them and that the weekly certificate was regularly forwarded to Madras. But the contract with Visvanatha Aiyar and Co., left it to the discretion of the plaintiffs, as already pointed out, to make such advances within the limits laid down and at such times as they chose. They were not bound to insist on seeing that goods of the value of the advances already made were in stock before making any further advance and it is more than doubtful that any such strict procedure would have been conducive to the advancement of the business. Further in fact goods almost of the entire value of the advances made to Visvanatha Aiyar& Co., were purchased and were in the tannery undergoing different processes of tanning and it has been already shown that their clandestine removal from the tannery of Visvanatha Aiyar & Co., could not be attributed to any appreciable negligence or want of vigilance on the part of the plaintiffs. A careful consideration of the facts as they happened and brought to the knowledge of the plaintiffs does not suggest that they acted otherwise than as prudent men of business or deviated from the ordinary and customary mode of dealing with tanners.

That being our conclusion on the evidence none of the provisions of the Contract Act and the rulings relied on on behalf of the appellants as to the circumstances in which a surety will be absolved from his obligation owing to the negligence of the creditor in dealing with the principal debtor has any application. We fail to find that the plaintiffs in this case did any act inconsistent with any rights of the 1st defendant or omitted to do any act which their duty towards the 1st defendent required them to do within the meaning of S. 139 of the Contract Act.

The well-known case of *Wulf* v. *Jay*[1], was relied on by the appellants. There the plaintiffs might have entered and taken possession of the plants and fixtures upon the interest not being paid at the time when it became due. Instead of doing this, however, they allowed the mortgagors to remain in possession when they saw that the bankruptcy was impending and imminent. " Cockburn, C. J., says that he had no doubt that their intention was, that, being creditors ultra the amount thus secured, the goods in question should be available as assets under the bankrupcty, while they had the security of the defendant to come upon in order to get paid the debt of 300 £ secured by the bill of sale." Then he refers to the cases cited in Story's Equity Jurisprudence which establish the proposition that " where a debt is secured by a surety it is the business of the creditor, where he has security available for the payment and satisfaction of the debt, to do whatever is necessary to make that security property available." In this case there was no negligence or wilful default on the part of the plaintiffs in not taking possession of the tannery before they actually did so. The case of *Watts* v. *Shuttleworth* [1], lays down the propositon embodied in Section 139 of the Contract Act already quoted. There the surety was held to be discharged as the plaintiff being under a duty towards him to insure the fittings had omitted to do so. Pollock, C. B., points out that "the rights of a surety depend rather on principles of equity than upon the actual contract; that there may be quasi-contract; but that the right of the surety arises out of the equitable relation of the parties." Lord Brougham in *Mactaggart* v. *Watson* [2], laid down the law in these words "while at law the surety in a bond is not at all discharged even by a long neglect of the obligee to demand payment or account from the principal—nay, when the latter has become insolvent during the time thus suffered to elapse, as was decided in the *Trent Navigation Company* v. *Hardy* [3], the Courts of Equity have never, to my knowledge, given a discharge to the surety merely on the ground of the creditor, the obligee, not having called on the debtor so early as he ought, or not having given early notice of his failure or non-payment to the surety." Then he observes "It is, however, undeniable that the Courts of Equity will look narrowly to everything in the conduct of the obligee which has a direct tendency to wrong the surety and injure his rights and equities, and will, as Lord Loughborough said in *Rees* v. *Berrington* [4], lay hold of such errors to release him. The error, however, in the present case arises in supposing that any want of care on the commissioners' side, in making the trustee do that which the surety had covenanted that he should do, was like a postponement of the surety's equities, or diminution of his rights at law." Further on he says "All this may be generally true, and yet it cannot avail to discharge a surety who has expressly bound himself for a person's doing certain things, unless it can be shown that the party taking the security has, by his conduct, either prevented the things from being done, or connived at their omission, or enabled the person to do what he ought not to have done," or leave undone what he ought to have done, and that but for such conduct the omission or commission would not have happened." The present case does not fall within the rule here enunciated. The case of *Mayor etc., of Durham* v. *Fowler* [1], also lays down clearly that mere laches of the obligee or a mere passive acquiescence by the obligee in acts which are contrary to the conditions of a bond is not sufficient of itself to relieve a surety, supposing that any such laches has been proved, which in this case, as was shown, has not been. Vice Chancellor Page Wood in *Dawson* v. *Lawes* [2], where it was sought to enforce the bond of the sureties given to the Registrars of the Court for the proper performance of the duties of an official assignee in bankruptcy, held, following *Mactaggart* v. *Watson* [3], that in such cases the negligence in order to discharge the sureties must amount to connivance at the official assignee's getting the fund into his hands improperly or must be so gross as to be equivalent to a wilful shutting of the eyes to the fraud which he was about to commit. No such case has been made out here. Much reliance was placed by the learned Vakil for the appellants on the case of *Mayor, etc., of Kingston-Upon-Hull* v. *Harding* [4]. I do not see how anything said in that case will help to discharge the 1st defendant in the present case from liability as surety. The ruling is that a surety for a contractor is not discharged from liability although his position has been altered by the conduct of the employer where that conduct has been caused by a fraudulent act or omission of the contractor against which the surety has, by the contract of suretyship, guaranteed the employer. Lord Esher, M.R., observes "It seems impossible to say that according to any doctrine of the law of suretyship a surety is released by something which happens in consequence of that which amounts to a fraudulent breach of contract against which the surety has guaranteed the party with whom he has contracted." At page 508 Bowen, L.J., observes "I can understand that, where the omission of the employer to do something deprives the

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[1] (1872) L R. 7. Q. B. Cases 756.

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[1] (1860) 5 H. and N. 235 (157 E.R. 1171)
[2] (1835) 3 C and F 525 (6 E. R. 1534).
[3] (1808) 10 East, 34.
[4] (1795) 2 Ves. Jun. 540.

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[1] (1889) 22 Q. B. D. 394.

[2] (1854) Kay. 280 : 69 E. R. 119.

[3] (1835) 3 C and F 525,

[4] (1892) 2 Q. B. 494.

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surety of a right under the contract, or of the power to insist on its exercise, such an omission really affects a right belonging to the surety and so alters his position as to aviod the relation of suretyship." That has no application to what happened in this case. Further on he says "The doctrine of law on this subject established in the case of *Mactaggart* v. *Watson* [1] and probably before that case, and expounded by subsequent authorities, particularly in the case of *Dawson* v. *Lawes* [2], and other cases referred to in *Mayor of Durham* v. *Fowler* [3] is this :- mere omission on the part of the employer, mere. passive acquiesence in acts which are improper on the part of the employee will not release the surety. If there be an omission to do some act which the employer has contracted with the surety to do, or to preserve some security to the benefit of which the surety is entitled, the case is different. There the omission would be one inconsistent with the relation between the surety and the person with whom he has contracted to be surety."

The law as expounded in the above cases which is the law applicable in India does not help the appellants in any way. It must therefore be held that they are not released from their liability under the bond by reason of any act or omission on the part of the plaintiffs.

[His Lordship next considered the evidence in the case and found that the defendants were entitled to an additional credit of Rs. 4,143-7-0].

The last question which remains to be considered relates to the liability of the 2nd and 3rd defendants. The 2nd defendant was a major at the time of the contract, Exhibit B, which refers to the guarantee bond, Exhibit BI, as already mentioned, executed by his father; and it must be taken that he consented to and authorised the giving of the guarantee by which the entire family property was made security for the due performance of the contract by Visvanatha Aiyar & Co., Mr. Mayne in his Hindu Law, 7th Edn. paragraph 344, correctly lays down that "any want of capacity on the part of the father to alienate the family property may be supplied by the consent of the coparceners. Such consent may either be express or implied from their conduct at or after the time of the transaction." That is sufficient to dispose of the 2nd defendant's objection.

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[1] (1835) 3 C & F 525.
[2] (1854) Kay, 280.
[3] (1889) 22 Q. B. D. 394,

The 3rd defendant, however, was a minor at the date of the transaction and if he is to be held liable at all it must be on the ground of a Hindu son's obligation to pay his father's debt if that debt was not incurred for immoral or illegal purposes. For, as found by the learned Subordinate Judge, there could have been no family necessity for the execution of the surety bond, Exhibit B1, pledging the family property, nor could the guaranteeing of the tanning business be a legitimate family purpose. The contention on behalf of the appellants is that a Hindu son's pious obligation to pay his father's debts does not arise so long as the father is alive inasmuch as he may in his own life-time discharge such debts or may leave assets sufficient to meet his liabilities. This proposition is based on a passage in the judgment of Lord Shaw in a recent Privy Council decision in *Sahu Ram Chandra* v. *Bhup Singh* [1]. It is not contended that under the Hindu Law as was applied in this Presidency or elsewhere before this judgment of the Privy Council a Hindu son's obligation to pay his father's debts not incurred for illegal or immoral purposes did not arise until after his death. In fact no such contention could be put forward in face of the state of the rulings of the Courts. It is not necessary to go through all the cases on the subject and it will be sufficient to mention some of the leading decisions including those of the Privy Council which left no room for doubt on the point. Here it must be mentioned that it is not a mortgage decree that is sought against the 3rd defendant's share but that he is sought to be made liable only to the extent of his share in the joint family property.

In *Sami Aiyangar* v. *Ponnammal* [2], both the father and son were sued on a hypothecation bond executed by the father and it was held that as regards the liability of the son's share for the debt of the father as a mere money claim there could be no question since it was found that the mortgage was for consideration and was not illegal or immoral. And both the learned Judges held the alienation to be bad inasmuch as it was not made for an antecedent debt. In *Ramasami Nadan* v. *Ulaganatha Goundan* [1] a Full Bench of this Court also held that in a suit against the father and son the son's share in the family property would be liable for the debt incurred by the father not being for any illegal or immoral purpose. Subramania Ayyar, J., delivering the leading judgment of the case, both upon a review of the original authorities and also of the rulings of the Courts says "Be this as it may, it is impossible to hold that under the law, as it stands established by the repeated decisions of the ultimate Court of Appeal, that a creditor suing a Hindu for his personal debt is not entitled to include, as defendants in the suit, the debtor's sons." In *Chidambara Mudaliar* v. *Koothaperumal* [2] also the same view of the law was accepted as established by a uniform course of decisions. The learned Judges, however, laid down that there was no distinction in principle between a mortgage given for an antecedent debt and a mortgage given for a debt then incurred. On the latter point, this decision has been overruled by a Full Bench in *Venkataramanaya Pantulu* v. *Venkataramana Doss Pantulu* [3].

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[1] (1917) I. L. R. 39. All. 437.

[2] (1897) I. L. R. 21 Mad. 28.

In Calcutta the law seems to have been the same; see *Luchman Doss* v. *Giridhur Chowdhry* [4], *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh* [5], and also in Allahabad—see *Karan Singh* v. *Bhup Singh* [6], *Chandradeo Singh* v. *Mata Prasad* [7], (which contains the judgment of Stanley, C. J., relied on by the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh* [8]) in which it is stated that a son may be successfully sued for the debts of his father as he is under an obligation to discharge his debts provided that the suit be not barred by limitation and that the decree passed in such a suit may be enforced in execution by the sale of the ancestral property of the family.

The rulings of the Judicial Committee on the point is also to the same effect as pointed out in the various cases referred to. I need mention only the case reported in *Nanomi Babuasin* v. *Modun Mohun* [1] where their Lordships laid down that if the father's debt, not having been contracted for an immoral purpose, is such as to support the sale of the entirety of the joint estate, either he may sell the latter without suit or the creditor may obtain a sale of it by suit; but the joint sons, not being parties to the execution proceedings or to the sale are not precluded from having a question as to the nature of the debt tried in a suit of their own; a right which will, however, avail them nothing unless it is shown that the debt is one which will not justify a sale of the joint estate.

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[1] (1898) I. L. R. 22 Mad. 49.
[2] (1903) I. L. R. 27 Mad. 326.
[3] (1905) I. L. R. 29 Mad. 200.
[4] (1880) I. L. R. 5 Cal. 855.
[5] (1907) I. L. R. 34 Cal. 735.
[6] (1900) I. L. R. 27 All. 16.
[7] (1909) I. L. R. 31 All 176.
[8] (1917) I. L. R. 39 All 437.

Now coming to the case in *Sahu Ram Chandra* v. *Bhup Singh'*, [2] the point for consideration before their Lordships was as to what was an antecedent debt within the meaning of Hindu Law which would justify a father in alienating the family property. There the only decree that could be obtained was on the basis of a mortgage; the plaintiffs claim for repayment of the money as simple debt had been barred long ago as pointed out by the Judicial Committee. The point they had to settle was whether the plaintiff under the circumstances was entitled to a mortgage decree. They first of all state the general principles of Hindu Law, namely, that a gift, sale or mortgage by one co-parcener except with the consent, either express or implied, of all the other co-parceners, is invalid but that the manager and the head of the family could alienate the family property for reasons of necessity. To these principles they point out there is one exception, namely, alienation by a Hindu father, of the family property in order to discharge an antecedent debt of his own. But it was further argued by the appellant (the respondents were not represented by counsel before their Lordships) that even a mortgage not executed either for family necessity or for an antecedent debt could be upheld on the basis of pious obligation of a son to pay his father's debt if the money which was borrowed on the mortgage was not obtained for an illegal or immoral purpose. In dealing with that argument they made the following observation which has given rise to so much difficulty in our Courts:

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1. (1885) I. L. R. 13 Cal. 21. 2. (1917) I. L. R. 39 All. 437=33 M. L. J. 14.

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"While the father, however, remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself, which they and their father jointly own, that attempt must fail; and the simplest of all reasons may be assigned for this, namely, that before the father's death he may pay off the debt, or after his father's death there may be ample personal estate belonging to the father himself out of which the debt may be discharged. In short, responsibility to meet the father's debts is one thing, and the validity of a mortgage over the joint estate is quiet another thing." In our opinion the last sentence shows that Their Lordships did not mean to lay down that so long as the father was alive the son could not be sued along with the father for a debt which was incurred by the father but not for any illegal or immoral purpose. All that the passage seeks to meet is the argument that the father was entitled during his life-time to dispose of the property of the family not for any family purpose nor to discharge any antecedent debt. It must be observed that if Their Lordships wanted to lay down the law as to the liability of the son to pay a father's debt by virtue of pious obligation differently from what had been so well established in India supported by their own previous decisions they would have expressed themselves clearly to that effect. On the other hand there is not even an allusion to any of the rulings on the question or to the state of the law as understood hitherto. A similar interpretation was placed on this decision by another Bench of this Court in *Peda Venkanna* v. *Sreenivasa Deekshatulu* [1], and the same view has prevailed in the Bombay High Court in *Hanmant Kashinath* v. *Ganesh Annaji*, [2]. In *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* [3], in execution of a mortgage-decree against the father the whole of the family property was held by the Privy Council to be liable to be sold if the debt was found not to have been incurred for an immoral purpose and in *Jogi Das* v. *Ganga Ram* [4] Their Lordships referring to the case of *Sahu Ram Chandra* v. *Bhup*

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[1] (1917) I.L.R. 41 Mad 136=33 M.L.J. 519.

[2] (1918) I.L.R. 43 Bom. 612.

[3] (1916) I. L. R. 44 Cal. 524.

[4] (1917) M. W. N. 789.

Singh [1], regard it as only laying down the proposition that the family property cannot be alienated except for necessity or for the payment of an antecedent debt quite distinct from the debt incurred for the mortgage itself, and that the sons of the mortgagor are not bound by any such alienation by reason of pious obligation to pay their father's debt and not that their shares in the family property would not be liable for a simple money-decree if the debt was not incurred for an immoral purpose.

In the result we confirm the judgment of the learned Subordinate Judge and dismiss the appeal with costs except that the decree will be modified by giving credit to the defendants for Rs. 5,975 instead of the amount allowed by the Subordinate Judge. The defendants will be allowed four months from this date for payment of the decree amount.

Ayling, J.

Ayling, J.:—I agree, and have nothing to add.

A. V. V.

PRIVY COUNCIL.

[PRESENT:—VISCOUNT FINLAY, LORD PARMOOR AND SIR JOHN EDGE].

[On Appeal from the High Court of Judicature at Allahabad].

Lala Matru Mal, since deceased (now represented
by Ghanshiam Das and another) and others... *Appellants**
v.
Mussammat Durga Kunwar, since deceased ... *Respondent.*

Mortgage—Prior and puisne mortgagees—Decree for sale—Extinguishment of mortgage — Position of puisne mortgagee not made a party to the suit — Transfer of Property Act (Act IV of 1882) Ss. 85, 89.

An order made under S. 89 of the Transfer of Property Act, 1882 (Act IV of 1882) for the sale of mortgaged property, has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage and the latter rights are extinguished.

When therefore a first mortgagee sued for and obtained a decree for sale without impleading a puisne mortgagee, and subsequently bought in the property, but did not obtain possession for several years:

Held, that the puisne mortgagee could redeem him on payment of the amount due under the decree, and was not liable to pay him the much larger amount to which he would have been entitled under his mortgage if he had not brought the property to sale.

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* 11th November 1919.

[1] (1917) I. L. R. 39 All. 437.

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Matru Mal v. Mussammat Durga Kunwar.

Het Ram v. *Shadi Lal*, 1 followed :—

Umes Chunder Sircar v. *Zahoor Fatima*, 2 distinguished.

Appeal from a decree of the Allahabad High Court, modifying a decree of the Additional Subordinate Judge of Aligarh.

The property in suit was mortgaged first in 1872 to the appellants' predecessor, later in 1879 to respondent's predecessor.

In 1884 appellants sued on their mortgage, without, however, making respondent's predecessor a party. They obtained a decree for sale in 1884 but the property was not sold till 1890, when it was bought in by Appellants for Rs. 13,702, which was the amount then due under the decree. Owing to obstruction by the mortgagors appellants did not actually obtain possession till 1895.

In 1909 the present respondent sued to redeem the property. The only question in dispute was as to how much she had to pay. Appellants contended that she had no right to redeem unless she paid the entire amount due under the mortgage up to the time when they got possession.

The trial Judge upheld this contention and gave respondent a decree for redemption on payment of Rs. 49,124. On appeal the High Court (Sir. H. Richards, C. J., and M. Rafique, J.,) reversed this decision and substituted for the amount allowed by the trial Judge the sum of Rs. 23,311 which respondent declared herself willing to pay. The material portion of their judgment was as follows :—

" It becomes necessary to consider what is the true position of the contesting defendants. The decree which was obtained on foot of the mortgage of the 19th of February 1872 is dated the 28th of February 1884. It found that there was due on foot of the mortgage the sum of Rs. 9,432-12-0 for principal and interest up to the date of the suit. It further awarded Rs. 29—13—7 interest *pendente lite*, and future interest at the rate of 6 per cent. per annum on the decretal amount together with costs. The property was ordered to be sold to realise these amounts. The property was sold on the 20th of March 1890 for Rs. 13, 762—6—3, which was the exact amount due on the decree at that date. The answering defendants allege that they did not get possession until 1895. Their contention is that they are now entitled to set up the mortgage of the 19th of February 1872 just as if it was still in force and effect up to the time that they got actual possession and that accordingly the interest should be calculated at the contractual rate which was 15 per cent. per annum compound interest with yearly rests.

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1. (1918) L. R. 45 I. A. 130. 2. (1890) I. L. R. 21 A. 170=17 I. A. 201.

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In our opinion this contention is not sound. As soon as the decree of the 28th of February 1884 was passed, the mortgage debt merged in the decree. It is a mere accident that the answering defendants are the mortgagees of the mortgage of February 1872 or their representatives. They have no greater rights than any stranger would have had who had purchased the property under the mortgage decree and paid cash for it. In our judgment all that the answering defendants are entitled to is to set up the amount of the decree of the 28th of February 1884. We may assume for the purposes of the present case that the answering defendants only got possession as alleged by them in 1895. We may also assume for the purposes of this case that they are entitled to simple interest on the amount of the decree including costs up to the date that they got possession, because even if they are allowed all this right up to obtaining possession, the amount will be less than the sum which the appellants, according to their memorandum of appeal, are willing to pay. We allow the appeal and modify the decree of the court below by substituting the sum of Rs. 23,311 for Rs. 49,124—9—0.

Hence this appeal :

E. B. Raikes for appellants, submitted that the High Court had erred in modifying the Subordinate Judge's decree, The appellants were entitled to the benefit of their mortgage, as they no longer had the benefit of their decree : *Umes Chandra Sircar* v. *Zahoor Fatima* [1]. The later case of *Het Ram* v. *Shadi Lal* [2] is distinguishable. There is no evidence here that a final order was made under the Transfer of Property Act 1882 : Moreover, the mortgages in this case were anterior to the Transfer of Property Act (Reference was also made to *Sri Gopal* v. *Pirthi Singh* [3].

Parikh for respondent : Upon a sale-decree being obtained under S. 89 of the Transfer of Property Act, 1882, the mortgage in suit and all rights under it are extinguished. *Het Ram* v. *Shadi Lal* [2]. In *Umes Chandra's case* not only the mortgages, but the decree itself, were anterior to the Transfer of Property Act.

The present case is governed by that Act : in 1884, when appellants sued, that Act provided the only procedure by which a sale-decree could be obtained under a mortgage. It must be presumed that a final decree was duly made here ; *Omnia præsumuntur rite esse acta.*

Raikes replied :

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1. (1890) L. R. 17 I. A. 201.
2. (1918) L. R. 45 I. A. 201.
3. (1903) L. R. 29 I. A. 118.

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Sir John Edge.

Their Lordships' judgment was delivered (December 2, 1919) by

Sir John Edge:—This is an appeal from a decree, dated the 27th January, 1916, of the High Court at Allahabad, which modified a decree, dated the 8th July, 1914, of the Additional Subordinate Judge of Aligarh.

In the suit in which this appeal has arisen, the appellants here or those whom they represent were defendants, and the plaintiff was Mussammat Durga Kunwar, who was the respondent to this appeal but is now dead; her personal representative is now the respondent. The suit was brought on the 8th July, 1909, by Mussammat Durga Kunwar to obtain a decree for the sale of certain immoveable property within the jurisdiction of the Court of the Subordinate Judge, and was based upon a mortgage of the property dated the 12th June, 1879, of which she became the assignee on the 21st, May, 1909, by an assignment from the representatives of one Murli Dhar, to whom the mortgage of the 12th June, 1879, had been granted; his mortgage was the second mortgage on the property. The property had been mortgaged on the 19th February, 1872, to the predecessors-in-title of the present appellants for Rs. 3,750, with compound interest at 15 per centum per annum with yearly rests.

On the 6th February, 1884, the first mortgagees brought a suit for sale under the Transfer of Property Act, 1882, on their mortgage, but did not make Murli Dhar, the second mortgagee, a party to their suit. On the 28th February, 1884, the first mortgagees obtained a decree in their suit for Rs. 9,342 as 12, for principal and interest due on this mortgage at the date of their suit, for Rs. 29, annas 13, pies 7, in respect of interest from the date of their suit to the date of their decree, and for further interest at the rate of 6 per centum per annum on the decretal amount until payment, and for costs. By the decree the mortgaged property should in default of payment be sold to realise the amount decreed. An order for sale was made and the property was sold on the 20th March, 1890, by public auction and was purchased by the first mortgagees for Rs. 13,702, annas 6, pies 3, the amount due under the said decree of the 28th February, 1884. Formal possession was given to the purchasers on the 15th August, 1890, but they did not obtain actual possession until the end of 1895.

In the present suit the defendants claimed that the plaintiff had no right to a decree unless she paid the entire amount of the first mortgage, with compound interest at 15 per centum per annum to the date when the purchasers at the sale of the 20th March, 1890, got actual possession, together with some revenue and irrigation charges, amounting in all to Rs. 55,155, annas 13, pies 2. The Subordinate Judge, no doubt acting on the decision of the Board in *Umes Chunder Sircar* v. *Musummat Zahoor Fatima and others*,[1] gave Musammat Durga Kunwar a decree for sale conditional on her paying to the defendants Rs. 49,124, annas 9. From that decree Mussammat Durga Kunwar appealed to the High Court.

The High Court in the appeal rightly held that the first mortgagee purchasers "had no greater rights than any stranger would have had who had purchased the property under the mortgage decree and paid cash for it." The learned Judges said: "In our judgment all that the answering defendants (the mortgagee purchasers) are entitled to is to set up the amount of the decree of the 28th February, 1884." But as Mussammat Durga Kunwar had by her petition of appeal only asked that the sum of Rs. 49,124, annas 9, should be reduced to Rs. 23,311, which she professed herself willing to pay, the High Court modified the decree to that extent. From that decree of the High Court this appeal has been brought.

At the time when the High Court delivered judgment the case of *Het Ram* v. *Shadi Lal and others*,[2] had not been before the Board. That case decided that an order made under S. 89 of the Transfer of Property Act, 1882 (Act IV of 1882), for the sale of mortgaged property, has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage, and the latter rights are extinguished. When the decree or order for sale in the case of *Umes Chunder Sircar* v. *Musummat Zahoor Fatima and others*[1], was made the Transfer of Property Act, 1882, had not been passed and the procedure prescribed by

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[1] (1890) L. R. 17 I. A. 201.

[2] (1918) L. R. 45 I. A. 130.

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that Act for suits for sales under that Act did not exist; that case was decided on the law as it then stood.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs, and that the decree of the High Court under the circumstances be confirmed.

Solicitors for Appellants :—*Rankeen Ford and Chester.*

Solicitors for Respondent :—*E. Dalgado.*

A. P. P.

PRIVY COUNCIL.

[PRESENT :—LORD SHAW, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS].

[On appeal from the High Court of Judicature at Fort William in Bengal].

Radha Kishun ... *Appellant*[*]

v.

Khurshed Hossein and others ... *Respondents.*

P. C.
Radha
Kishun
v.
Khurshed
Hossein.

Res Judicata—Ground of defence—Mortgage—Suit for sale under a mortgage—Prior mortgagee made party but prior mortgage not attacked—Whether prior mortgagee is a necessary party in a suit by a puisne mortgagee—Code of Civil Procedure (Act V of 1908) *S.* 11—*Transfer of Property Act (IV of* 1882) *Ss.* 85, 96.

Section 96 of the Transfer of Property Act expressly provides that when property, the sale of which is directed, is subject to a prior mortgage, it may be sold free of such mortgage with the consent of the prior mortgagee: and implies, that without such consent it cannot be so sold.

A prior mortgagee has a paramount claim, and although made a party in a suit by a puisne mortgagee, need not intervene unless his mortgage is impugned.

Where, therefore, a prior mortgagee was made a party to such a suit but did not appear, and subsequently brought a suit on his mortgage :

Held, that he was not barred from asserting his claims by S. 11 of the Code of Civil Procedure, inasmuch as there was no need for him to make his prior mortgage, the validity of which had not been attacked, a ground of defence in the former suit.

Appeal from a decree of the Calcutta High Court, dated May 24th 1915, affirming a decree of the Additional Subordinate Judge of Mozufferpur.

The appellant sued for a sale decree under a mortgage. The only question for determination on this appeal was whether as to four villages forming part of his security his claim was barred by the plea of *res judicata*. The High Court (Fletcher and Richardson, JJ.,) affirming the trial Judge, held that it was. In the present appeal the principal contest was as to two of the villages, Pandarhia and Gamarhia. As to these the judgment of Fletcher, J., in which Richardson, J., concurred, was as follows :—

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[*] 31st October and 3rd November 1919.

"I will now deal with the appeal of the plaintiff. The learned Judge has held that the plaintiff is not entitled to redeem certain mouzahs or to have them brought to sale.

The first two mouzahs are called Pandarhia and Gamarhia. These two mouzahs where mortgaged on the 28 th of April 1894 to the defendants Nos. 37 to 42. A suit was brought on this mortgage, and to that suit the defendant No. 43 was made a party but he failed to enter an appearance in the suit. A preliminary decree was passed in that suit on the 28th July 1906. Whether or not the decree absolute has been made, does not appear. The plaintiff argues that so long as the decree absolute has not been made the equity of redemption has not finally gone. That may be so. But it is a very different question as to whether the plaintiff can redeem in this suit. In my opinion the learned Judge was right when he held that he could not. So long as the decree of the 28th of July 1906 remains on foot the plaintiff claiming through the defendant No. 43 is bound by it. The defendant No. 43 failed to appear in that suit and set up his prior mortgage. The plaintiff cannot set up that mortgage now as against the defendants Nos. 37 to 42. The case of *Gopal Lal* v. *Banarsi* [1], appears to me to be a clear authority for that proposition."

Dunne, K. C., and *E. B. Raikes for Appellant* : The appellant is not estopped by the decree in Suit No. 100 of 1906 from enforcing his mortgage. S. 85 of the Transfer of Property Act merely provides that all persons having an interest in the property comprised in a mortgage shall be joined as parties : the property which was the subject of suit No. 100 was merely the equity of redemption. True, our assignor was made a party and did not appear : but there was no need for him to do so. The latest authorities both in Allahabad and Calcutta held that the prior mortgagee is not bound : and there is no case before the Board of a person being joined who was not a puisne mortgagee. Under S. 96 of the Transfer of Property Act the property cannot be sold free of the prior mortgage without the prior mortgagee's consent. In *Gopal Lal* v. *Benarsi* [1] on which the High Court has relied, the puisne mortgagee not merely made the prior mortgagee a party, but prayed for a sale free from incumbrances : the prior mortgagee did not oppose that prayer, hence the decision : that is not the case here. In *Sri Gopal* v. *Pirthi Singh*[2] the prior mortgagee was also

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[1] (1904) I. L. R. 31 Cal. 428.

[2] (1902) L. R. 29 I. A. 118.

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a puisne mortgagee: all the Board held in that case, was that he should have set up all his claims, if he wished to rely on any of them.

The Allahabad High Court has expressly held that a first mortgagee in circumstances similar to those here can bring a suit for sale upon his mortgage: *Ajudhia Pande* v. *Inayatullah* [1].

All that was decided in *Mahomed Ibrahim Hossein Khan* v. *Ambika Persad Singh* [2] was that a puisne mortgagee who is joined as a party, and who has an equitable right prior to the mortgage which the suit is brought to enforce, will be estopped if he fails to assert such equitable right: that decision does not affect the present case. Inferentially, the judgment shows that even under the Act of 1882 a prior mortgagee was not a necessary party to a suit for sale by a puisne mortgagee: a matter which is now expressly laid down in the Code of Civil Procedure, 1908.

(*Mr. Ameer Ali* referred to Ghose on Mortgages, p. 681 and observed that Dr. Rash Behari Ghose was a recognised authority).

Sir W. Garth, K. C., and *Dube* for respondents:—Appellant's predecessor-in-title, the prior mortgagee, was made a party to Suit No. 100 of 1906 and the decree in that suit is *res judicata* against him under Explanations IV and VI to S. 11 of the Code of Civil Procedure, 1908: the prior mortgage was a ground of defence which he could and should have taken: *Mahomed Ibrahim Hossein* v. *Ambika Prasad* [2], *Gajadhar Teli* v. *Bhagwanta* [3].

It was incumbent upon the appellant's predecessor in the former suit to prove his prior mortgage, and he did not do so. The plaint cannot have admitted the prior mortgage: if it had, the decree would have been in a different form. If it is not clear that the prior mortgage was not admitted, the case should be remitted to ascertain the contents of the plaint: the admission should not be assumed.

Dunne, K. C., *in reply*, referred to *Mahiruddin Mandal* v. *Indra Kumari* [4], and *Krishna Dayal Gir* v. *Amirul Hasan* [5]. In both these cases the earlier suit was under the Transfer of Property Act, 1882.

Their Lordships' judgment was delivered (Dec. 2, 1920) by

Sir Lawrence Jenkins.

Sir Lawrence Jenkins.—The suit out of which this appeal arises is one brought by the appellant, Radha Kishun, for the realisation of his mortgage security by sale, and the only question now remaining for decision is whether the appellant's claim to four

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[1] (1912) I.L.R. 35 All. 111.
[2] (1911) L.R. 39 I.A. 68.
[3] (1912) I. L. R. 34 All 519.
[4] (1914) 18 Cal. W.N. 1013.
[5] (1914) 19 C. W. N. 942.

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villages which form a part of his security is barred by the plea of *res judicata.*

The Additional Subordinate Judge of Mozufferpur and on appeal the High Court of Calcutta, have decided adversely to him. He has accordingly preferred this appeal.

There are two groups of contesting respondents who may be conveniently described as the Sheikhs and the Sahus. The Sheikhs claim the two villages called Barnihar and Lachnowta, the Sahus those named Pandharia and Gamharia.

The validity of the Sheikhs' claim to the two villages of Barnihar and Lachnowta is beyond dispute and the High Court's conclusion with regard to them must be upheld.

To the contest as to the other two villages, however, different considerations apply.

By an instrument dated the 13th May, 1892, these villages were mortgaged to Kishun Lal to secure Rs. 40,000.

On the 7th September, 1906, the mortgage and the security were transferred to the appellant by Bakhtaur Mull Abhor on whom they had devolved on Kishun Lal's death. This is the appellant's title, and it is not now disputed except so far as the plea of *res judicata* may be a bar to its successful assertion.

But on the 25th February, 1891, the villages had been transferred by way of usufructuary mortgage to the Sahus, and on the 28th April, 1894, a simple mortgage of them was executed to the same mortgagees.

On the 15th March, 1907, the present suit was instituted by the appellant against the Sahus and others for enforcement of his mortgage.

It was tried in 1909, and as against the Sahus it was dismissed as barred by the plea of *res judicata* on the 12th October, 1909, and this was affirmed on appeal by the High Court on the 24th May, 1915.

The former suit on which this plea is based is Suit No. 100 of 1906. It was brought by the Sahus, and the defendants to it included the mortgagor and Bakhtaur Mull, the present appellant's predecessor-in-title.

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The claim was for recovery of the mortgage-money due on the mortgage-deed of the 28th April, 1894. Reference was made to the zurpeshgi deed of the 25th February, 1891, with a view to safeguarding it.

A decree was passed on the 6th August, 1906, in the absence of the defendants, and it was ordered that "this suit is decreed, and that if the principal with interest as mortgage-bond with costs in Court is paid within six months the mortgaged property be released from mortgage, and in the event of the decretal money not being paid the mortgaged property will be sold subject to former zurpeshgi mortgage-deed." The decree then proceeds to make a personal order for payment against the defendants.

The contention for the Sahus is that as the present appellant did not make his mortgage deed of the 13th May, 1892, a ground of defence in the former suit he is now barred from suing on it.

The rule of *res judicata* is contained in section 11 of the Code of Civil Procedure, 1908, which provides that no Court shall try any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties litigating under the same title in a Court competent to try such subsequent suit, and has been heard and finally decided. Had this been an exhaustive statement of the rule it obviously would not have supported the plea in the facts of this case, and so reliance has been placed on Explanation IV which provides that any matter which might and ought to have been made ground of defence in such former suit shall be deemed to have been directly and substantially in issue in such suit.

The mortgage-deed of the 13th May, 1892, it is urged, might and ought to have been made a ground of defence in the former Suit No. 100 of 1906, and by the omission the present suit is barred.

The rule is clear; the controversy is narrowed down to the question whether the facts invite its application.

It becomes necessary, therefore, to see what was the position of Bakhtaur Mull in the former Suit No. 100 of 1906. It

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was a suit brought by the Sahus to enforce against the mortgagor their mortgage deed of the 24th April, 1894. Bakhtaur Mull was joined as a defendant but whether any or what relief was sought against him does not appear.

Bakhtaur Mull's mortgage was prior to that on which the Sahus sued, and its validity is now admitted.

The case, therefore, came within the terms of S. 96 of the Transfer of Property Act, 1882, which expressly provides that where property the sale of which is directed is subject to a prior mortgage the Court may, with the consent of the prior mortgagee, order that the property be sold free from the same, giving to such prior mortgagee the same interest in the proceeds of the sale as he had in the property sold. The implication of the section is that without such consent the property could not be so sold.

Bakhtaur Mull's position therefore was that he was a prior mortgagee with a paramount claim outside the controversy of the suit unless his mortgage was impugned. Consequently to sustain the plea of *re judicata* it is incumbent on the Sahus in the circumstances of this case to show that they sought in the former suit to displace Bakhtaur Mull's prior title and postpone it to their own. For this it would have been necessary for the Sahus as plaintiffs in the former suit to allege a distinct case in their plaint in derogation of Bakhtaur Mull's priority.

But from the records of this suit it does not appear that anything of the kind was done, and, as has been observed, of things that do not appear and things that do not exist the reckoning in a Court of law is the same.

The Sahus, therefore, have failed to establish the conditions essential to their plea, and they alone are responsible for this defect. The plaint in Suit No. 100, of 1906, has not been produced, and this omission is not supplied by the summary of the plaint set out in the extracts from the decree (Exhibit J. 37 c.). That summary still leaves the contents of the plaint a matter of mere conjecture and certainly does not show that Bakhtaur Mull's mortgage was attacked. The decree, too, is open to the same comment. In arriving at this conclusion their Lordships have not overlooked the authorities cited at the Bar, but so far as they are binding on this Board they are clearly distinguishable.

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Their Lordships at one time hesitated as to whether it would not be the better course to afford the Sahus an opportunity of producing the record of the former suit but, on reflection, they felt that they were not entitled to this indulgence. The Sahus have been singularly remiss: the absence of this evidence was not sprung upon them in the argument before this Board; it was made a ground of complaint in the application for leave to appeal, and yet no attempt has been made to meet it.

Nor is this the only defect in their proofs for they have not even shown by any evidence on the record that being decree-holders they obtained an order absolute for sale, or the necessary permission of the Court to purchase the property. Moreover, it is not without importance that it is the decree-holders who claim to have bought in execution and that they are endeavouring to defeat by their plea a mortgage of which they had notice, and which on their own admission now made was valid and so of necessity paramount to their claim.

Their Lordships, therefore, hold that the plaintiff's claim to the villages of Pandharia and Gamharia cannot be defeated by the plea of *res judicata*, and that it was erroneous to dismiss the suit as against the defendants 37 to 42. They will, therefore, humbly advise His Majesty that the decrees of the High Court and the Additional Subordinate Judge ought to be varied accordingly, and the case remitted to the High Court with directions to modify its decree in accordance with this decision in regard to the two villages of Pandharia and Gamharia, the adjustment of costs consequent thereon, and otherwise as the circumstances of the case may require. There will be no order as to the costs of this appeal.

Solicitors for Appellant :—*W. W. Box and Co.*

Solicitors for Respondents :—*Barrow Rogers and Nevill.*

A. P. P.

PRIVY COUNCIL.

[PRESENT LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS].

[On Appeal from the High Court of Judicature at Bombay].

Sakinabai ... *Plaintiff* (Appellants.)*

v.

Shirinibai and others ... *Defendants-(Respondents.)*

P. C.

Sakinabai
v.
Shirinibai.

Privy Council Procedure—Withdrawal of appeal on terms—Parties not sui juris *minors—When consent of Court will be given.*

Applications to allow an appeal to be withdrawn on terms when there are parties concerned who are not *sui juris, e.g.,* minors, should not be granted without grave consideration.

The Courts in India should ordinarily accept as sufficient the assurance of the minor's counsel that the compromise which is proposed is for his benefit.

In the present case the Board allowed such a compromise in an appeal pending before it on the assurance of the minor's counsel, supported by a certificate of the Counsel, who had appeared for him in the lower Courts.

Application to withdraw an appeal to His Majesty in Council from a decree of the Bombay High Court.

This suit arose out of the will of a widow, Khansubai, who left considerable property. The defendants were the executors and beneficiaries under the will. One of them, a beneficiary, was a minor, and was represented by his guardian, Shirinbai, one of the executors. The learned Judge decreed the suit, but on appeal his decision was reversed. Plaintiff Sakinabai therefore presented the present appeal. Pending the hearing the parties entered into a written agreement for the withdrawal of the appeal on certain terms.

The present application was by the minor respondent, and prayed for a certificate that the agreement of compromise was for the benefit of the minor, or that the case might be remanded to the High Court to enquire and certify whether the agreement was for the benefit of the minor, and upon such certificate that leave be given to withdraw the appeal. The application was supported by an affidavit by Shirinbai, stating that she was advised that the compromise was for the benefit of the minor, annexed to which was the opinion of Counsel who had appeared for Shirinibai at the trial and for Shirinibai and the minor on the appeal in the High Court, advising the compromise as being in the interest of the minor.

E. B. Raikes, for Petitioner.

Kenworthy Brown, for the minor Respondent.

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* 17, 21st November, 1919.

P. C.

Sakinabai v. Shirinibai.

Lord Shaw

Their Lordships' judgment was delivered (Nov. 21, 1919) by

Lord Shaw:—Applications to allow an appeal to be withdrawn on terms when there are parties concerned who are not *sui juris* are not granted without grave consideration. In the present case Mr. Kenworthy Brown, as Counsel for the minor concerned, having considered the whole proceedings, both in their legal bearings and with a full regard to the interests of the minor and his estate, has assured their Lordships that he is of opinion that the compromise is for the benefit of the minor. The case is further strengthened in that direction by a certificate of Mr. J. B. Kanga and Mr. V. F. Taraporewala, the counsel for the minor in the Courts below, that the compromise which is proposed is for his benefit.

If there were an appeal pending before the High Court this certificate would have been presented to the Court below, if advantage had been taken of Rule 7 of Order 32 of the Code of Civil Procedure which prescribes that :—

> "No next friend or guardian for the suit shall, without the leave of the Court expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian."

In these circumstances the Board finds itself in possession of what, according to ordinary practice, would have been satisfactory to the Court below, whose leave to enter into a compromise would have been asked. It has the further assurance of learned Counsel at its own Bar: and upon the whole their Lordships are of opinion that this compromise is for the benefit of the minor and one that they should sanction. In terms of the compromise, accordingly, their Lordships will advise His Majesty that leave should be granted to withdraw the appeal.

Solicitors for the Appellant-Petitioner :—*Hughes and Son.*

Solicitors for the Respondents :—*T. L. Wilson and Co.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SADASIVA AIYAR.

P. Suryanarayana Rao, Naidu ... *Appellant** (*Plaintiff.*)

v.

P. Balasubramania Mudali and others, etc.,... *Respondents.* (*Defendants.*)

Surya-
narayana
Rao Naidu
v.
Bala-
subramania
Mudali.

Hindu Law—Ancestral family dwelling house—Residence in—Right of female members of family—Distinction between widow and unmarried daughters of last owner and widows of deceased co-parceners and unmarried sisters—Sale of family house in execution of decree against brother—Effect on right of residence of unmarried sisters—Suit debt only private debt of brother—Effect.

The unmarried sisters of a Hindu are, under the Hindu Law, entitled to reside in the family house till their respective marriages, and their right of residence is not affected by a sale in execution of a decree obtained against him for a debt incurred by him not for family necessity but for his own personal benefit. A portion of their right is not affected by a sale for the debt of their brother's next female heir and legal representative. In this respect, the wife and the unmarried daughters of the debtor stand on a different footing from the widows of the deceased coparceners (including the mother) and from unmarried sisters.

Quaere: Whether a private sale of a person's ancestral family dwelling house without necessity can deprive even his wife and unmarried daughters of their rights of residence.

Appeal against the Decree of the City Civil Court of Madras in Original Suit No. 327 of 1918.

Venkatasubba Rao and Radhakrishnayya, for the Appellant.

K. Rajah Aiyar, for the Respondent.

The Court delivered the following

Sadasiva Aiyar, J.

Judgments:—*Sadasiva Aiyar, J.*:—The plaintiff is the appellant. He purchased in court auction sale the plaint house in execution of a decree passed against defendants 2, 3 and 4. The defendants 3 and 4 had no rights in the property and we may take it that the plaintiff purchased the right, title and interest of the 2nd defendant in the house. The house belonged to the 2nd defendant's husband Ekambara Mudali and then to Ekambara Mudali's only son who died a minor. On her minor son's death the 2nd defendant as his heir became the qualified female owner of the house. The minor left his two sisters, defendants 6 and 7, unmarried. The money decreed against the 2nd defendant was passed for a personal debt of the 2nd defendant, the mother and the next heir of the

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*C. C. C. A. No. 20 of 1919. 19th Dec. 1919 and 30th January, 1920.

Surya-narayana Rao Naidu v. Bala-subramania Mudali.

Sadasiva Aiyar, J.

last male owner. The plaintiff, purchaser in Court auction, obtained delivery of the downstairs portion, but the upstairs portion of the house now in dispute was occupied by the defendants 6 and 7, the two unmarried sisters of the last male-owner, and they refused to vacate as they claimed a right under the Hindu law to reside in the house which belonged to their father and their brother till their (the said defendants') respective marriages. Hence the suit brought to eject them on the ground that they had no such rights under the Hindu Law.

The learned City Civil Judge decided this interesting question of Hindu Law against the plaintiff and in favour of the defendants 6 and 7 and dimissed the suit: Hence this appeal.

So far as the widows of undivided co-parceners are concerned (including a widowed mother), the authorities are very clear that a private sale by the surviving male co-parcener which was not for family necessity or an execution sale held for a decree debt, which did not arise out of family necessity would not entitle the purchaser to oust such widows as the latter were entitled to reside in the ancestral family house till at any rate, other adequate provision is made for their residence. The question of unmarried girls who were not related to the surviving male co-parcener as direct descendants from him but as sisters or cousins (that is, as daughters of deceased undivided co-parceners) seems not to have formed the direct subject of any reported decision. In the case of the wife of the surviving co-parcener, it has been held in the *Jayanti Subbiah* v. *Alamelu Mangamma* [1] that the wife cannot set up any right of residence against the purchaser in execution for her husband's debts. I shall presently consider the ratio of that decision. But before leaving this part of the subject, I would finally remark that the general question was elaborately considered by Sir Barnes Peacock, C. J., (with whose judgment Mitter, J., concurred) in *Mungala Dabee* v. *Dinanathbose*, [2]. The very general language of the learned Chief Justice's dictum is to the effect that the father's widow and "the other females of the family who are entitled

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1. (1902) I. L. R. 27 Mad. 45. 2. (1869) 12 Weekly Reporter, A. O. J. 35.

Surya-narayana Rao Naidu v. Bala-subramania Mudali.

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to maintenance out of the dwelling selected by the father for his own residence and in which he left the females of the family at his death cannot be turned out of that residence at least until some other place has been provided for them." If this general dictum applies, the unmarried daughters of the father being also "females of the family entitled to maintenance", and residence can resist being turned out of the dwelling selected by their father for his own and their residence. No doubt there is a distinction between the widows of co-parceners and the father's widow on the one side and unmarried females on the other side because the former are entitled to maintenance and residence till death or re-marriage, whereas unmarried females are entitled to maintenance and residence only until their marriage. But as the learned City Civil Judge points out, the difference in the length of the period and in the circumstances when the right of maintenance and residence ceases cannot affect, on principle, the right to resist the eviction from the family dwelling house so long as the right of maintenance and residence subsists.

Mr. Radhakrishna Aiyah for the appellant argued that if every female entitled to maintenance and residence can exercise the right of obstruction to ejectment, it would be very unfair on purchasers from the surviving members of a Hindu family and on purchasers in execution of debts due by such member and even the wife of the debtor and the unmarried daughters of the debtor might claim to resist the purchaser. I might here remark that even as regards the mother and the coparcener's widow of the debtor the right of residence is curtailed (*a*) by restricting it to cases where the debt for which the property is sold is not contracted for necessity and (*b*) by the rule that the females cannot claim a right of residence in the whole of the premises if a portion of the house could be set apart for them and would afford reasonably sufficient accommodation and (*c*) that if other reasonable accommodation even outside the family dwelling-house is offered, they may be bound to accept such a substitute at least, in certain circumstances.

As regards the wife, I shall now return to ***Jayanti Subbiah*** v. ***Alamelu Mangamma***[1] where Bashyam Aiyan-

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[1] (1902) I. L. R. 27 M. 45.

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gar, J., delivered the judgment which was concurred in by Benson, J. While affirming the general principle which had been laid down in *Venkatammal* v. *Andiyappa Chetti* [2] and *Ramanadan* v. *Rengammal*,[3] the learned Judge distinguished the case of the wife of the debtor for whose debt the property was sold on the following grounds: (so far as I am able to follow his reasoning) (*a*) the debt contracted by the husband himself is necessarily binding upon the wife absolutely; (*b*) on his death without male issue, his estate devolves on her by right of inheritance and so no right of maintenance or residence apart from ownership as heir can be invoked in her favour as in the case of a co-parcener's widow: (*c*) the mother's right may be traced to the father's co-parcenery right just as in the case of the other co-parceners; and is not derived from the debtor directly; (*d*) the wife's right of maintenance during her husband's life-time "is only a matter of personal obligation on the part of the husband quite independent of the possession of the ancestral property by him". The learned Judge also fortified himself by the dictum of Kernan, J., in *Venkatammal* v. *Andiyappa* [1], that if the debt in respect of which the sale took place was a debt due by the husband of the woman who claims the right of residence, "no doubt could be entertained that she had no such right". After making the above distinctions, he disallowed the right of the widow of the debtor to resist possession by the purchaser in court auction. In doing so, he dissented from the decision in *Manilal* v. *Bai Tara*[3]. J.C. Ghose in his very learned work on Hindu law seems to be inclined in favour of the Bombay decision and against Bashyam Aiyangar, J's opinion.

I shall not lengthen this judgment by elaborately considering whether all the 4 distinctions (*a*) to (*d*) relied on by the learned Judge are tenable. It is sufficient to state that the wife and unmarried daughters of the debtor stand on a different footing from the widows of deceased co-parceners (including the mother) and from unmarried sisters. If even the undivided *sons* of the debtor cannot attack the sale in execution of the father's debt (not illegal or immoral), I do not see how unmarried *daughters* can be allowed to attack it or put forward a right of residence against the pur-

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1. (1882) I. L. R. 6 Mad. 130.
2. (1888) I. L. R. 12 Mad. 260.
3. (1892) I. L. R. 17 B. 398.

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chaser. As regards the wife, she is under even a greater obligation (under the Hindu Law) than the sons, not to question the validity of her husband's debts. The mother and the widows of coparceners and the unmarried sisters are under no such obligation with respect to the debt of the surviving male owner which was not incurred for family necessity. I need hardly say that if the sale for their brother's debt itself would not deprive defendants 6 and 7 of their right of residence, a sale for the debt of the brother's next female heir and legal representative (which is the present case) cannot be held to deprive them of such right. The question whether a *private sale* of a person's ancestral family dwelling house *without necessity* (apart from the question of its being sold in *execution* of a decree for his debt) or without the purchase money being required to discharge his own antecedent debts can deprive even his wife and unmarried daughters of their right of residence is a somewhat more difficult question on which it is unnecessary to express a final opinion in this case.

In the result, I would dismiss the appeal with costs.

Chief Justice:—I entirely agree.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS KT. CHIEF JUSTICE AND MR. JUSTICE KRISHNAN.

Narayanan Chetty and others.	... *Appellants** (3 *and* 4 *Defendants*)
v.	
K. N. P. R. Suppiah Chetty and others.	... *Respondents* (*Plaintiff and Defendants* 1 *and* 2.)

Narayanan Chetty
v.
Suppiah Chetty.

Hindu law — Widow — Accumulations — Incorporation—Intention of parties Evidence—Interest on investments—Nattukottai Chetti—Deposit on Thavanai terms—Nature of Suit to recover—Limitation as to principal and interest—Limitation Act—Arts. 60. 63—Applicability—Nattukottai Chetty trading family—Manager—Acceptance of money on deposit on thavanai terms—Validity.

Held, on the evidence in the case that the widow of the last male owner acquiesced in the interest accrued due during her lifetime on her husband's investments being treated as part of his estate and that his reversionary heirs were entitled to the said interest and not the heirs of the widow.

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* A. S. No. 370 of 1918. 5th January, 1920.

Quaere as to the rule applicable if the evidence merely were that the widow had failed to collect the interest on money forming part of her husband's estate.

In a deposit with Nattukottai Chetties on thavanai terms the understanding between the parties is that, at the end of each thavanai period, the interest for that period instead of being payable in cash to the creditor should be added to the deposit so that both should be treated as a fresh deposit.

A suit to recover a deposit with a Nattukottai Chetti on thavanai terms is governed by art 60 of the Limitation Act both as to principal and as to interest. The claim as to interest is not governed by art. 68 of the Act.

It is within the competence of a manager of a joint Hindu Nattukottai Chetty trading family to accept money on deposit on thavanai terms.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Sivaganga in O. S. No. 31 of 1917.

G. Krishnaswami Aiyar for the appellants.

T. V. Muthukrishna Aiyar for the Respondents.

The Court delivered the following

Wallis, C. J.

Judgments :—*The Chief Justice* :—This is an appeal from the judgment of the Temporary Subordinate Judge of Sivaganga in a suit brought by the next reversioner of the deceased Raman Chetty to recover from the defendants, who are members of a Nattukottai Chetty trading family, a certain sum which they alleged to have been deposited after Raman Chetty's death by Raman Chetty's uncles as forming part of the estate. The Subordinate Judge has decreed the suit in part.

The first point taken by Mr. Krishnaswami Aiyar for the defendants is that although the plaintiff as reversioner may be entitled to recover the principal, he is not entitled to recover the interest which accrued due during the lifetime of the widow as that formed part of her estate and was descendible to her heirs in the absence of any intention having been manifested on her part to incorporate it with the estate of her deceased husband. The evidence is that after her husband's death his uncles deposited the money with another firm of Nattukottai Chetties who closed their business and that the deposit with them was transferred to the defendant's firm, and the evidence is that they were instructed to pay Rs. 50 a year to the widow for her maintenance, which sum she admittedly received. Now there is no evidence that she ever claimed to be entitled to any more. Whether it was so or not, the evidence shows that the intention of the uncles was that

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the whole sum should go to her son if she adopted one, which she never did. In these circumstances, the inference appears clear that the widow rightly or wrongly acquiesced in the interest on this sum being treated as part of her husband's estate and as incorporated with her husband's estate and descendible to his heirs. She never even claimed to receive it. The case therefore is clearly distinguishable from the cases to which we have been referred. *Subramanian Chetty* v. *Arunachellam Chetty* [1], *Isri Dutt Koer* v. *Hansbutti Koerani* [2], *Saodamini Dasi* v. *The Administrator-General of Bengal* [3], *Viraraghava Reddi* v. *Kotti Reddi* [4] and *Sri Vikrama Deo Garu* v. *Sri Vikrama Maharajalungaru* [5] which were cases in which the income from the husband's estate had come into the possession of the widow and she had disposed of it in one way or other. In *Isri Dutt* v. *Hansbbutti Koerani* [6] she manifested her intention that it should be incorporated with the husband's estate and it was held that she could not go back on this. In the other cases it was held that she had manifested her intention to treat it as her own separate property descendible to her own heirs. In the view we take of this case it is unnecessary to consider what would be the rule applicable if the evidence merely were that the widow had failed to collect the interest on money forming part of her husband's estate. On the other hand, there is a dictum of the Privy Council in *Isri Dutt* v. *Hansbutti Koerani* [7] which might be relied on. On the other hand, there is the elaborate discussion of *Sir Subrahmania Aiyar, J.*, in *Subramanian Chetty* v. *Arunachellan Chetty* [1] which treats the statement of the Privy Council as a mere obiter dictum but is also itself obiter. For the purpose of the present case, it is enough to say that the widow clearly acquiesced in the interest being treated as part of her husband's estate.

The next question is one of limitation. This Court in recent years on several occasions, had to consider what was the nature of the deposits with Nattukottai Chetties on what are called thavanis, and in a case in *Muthiah Chettiar* v. *Ramanathan Chettiar* [8] this court held that such cases were governed by Art. 60 both as to principal and to interest. In the present case Mr. Krishnaswami Aiyar has taken the point that so far as interest is concerned, these transactions are governed by Art. 63—" For money payable for interest upon money due from the defendant to the plaintiff." It is said in *Muthiah Chetty* v. *Ramanadhan Chettiar* [1] with reference to thavani transactions that " the idea is that the money should remain until demanded and the interest should be added at the expiration of each thavanai." As I understand it, that means that the understanding between the parties is that, at the end of each thavanai period, the interest for that period instead of being payable in cash to the creditor should be added to the deposit so that both should be treated as a fresh deposit ; and if that be so, then the article applicable continues to be only Art. 60 and not Art. 63 which is "for money payable for interest," and the starting point under that article is when the interest becomes due. As I understand it, that means, when the interest becomes actually payable. If the agreement between the parties is that the interest is not to be payable until demanded but is to be added to the deposit as an increment to the deposit, then I think that Art. 63 would apply and Art. 60 does. That is the view which has hitherto been taken in this Court and this is the first time that any one has suggested that Art. 63 would be applicable. I think that very serious consequences would result if that article were held applicable because very large amounts of money have been deposited with Nattukottai Chetties on these terms and nobody has ever thought that it was necessary to make constant demands upon them.

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[1] (1904) I. L. R. 28 Mad. 1.
[2] (1888) I. L. R. 10 Cal. 324. (P.C.)
[3] (1892) I. L. R. 20 Cal. 433. (P.C.)
[4] (1916) 31 M. L. J. 465.
[5] (1917) 33 M. L. J. 665.
[6] (1883) I. L. R. 10 Cal. 323.
[7] (1883) I. L. R. 10 Cal. 324 at 343.
[8] (1917) 7 L. W. 330.

Mr. Krishnaswami Aiyar also argued that it was not within the competence of the managers of the joint Hindu Nattukottai Chetty trading families to accept money on deposit on thavanai terms, that it is not competent for them to do one of the most ordinary things in the transaction of their business. That position is quite untenable.

For the reasons I think that the appeal fails and must be dismissed with costs.

Krishnan, J.—I agree.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE BAKEWELL.

Venkatasami Naidu ... *Appellent** (*Petitioner*).

v.

Gurusami Aiyar ... *Respondent.*

Venkatasami Naidu
v.
Gurusami Aiyar.

Attachment before judgment—Effect—Subsequent sale of attached property in execution of another decree—Subsequent application by person who attached before judgment for sale of the property in execution—Application by prior execution purchaser for dismissal of application—Maintainability.

The appellant and the respondant attached the property of the same person before judgment in their respective suits against him. Both obtained decrees for money one in the court of the District Munsif of Tanjore and the other of Valangiman and both applied in the Court of the District Munsif of Valangiman for execution of their respective decrees. The first application of the Respondent was, however, dismissed, whilst the appellant's application resulted in a court sale in which he purchased the attached property. When the respondent again applied for a sale of the same property in execution of his decree, the appellant applied in that proceeding for an order dismissing the respondent's application on the ground that he (appellant) had become owner of the property.

Held, that the ownership of the property passed to the appellant from the moment that the sale was knocked down to him and the judgment-debtor retained no interest in it which could be attached or sold; that, as representative of the judgment-debtor, appellant was competent to make the application he did, and that respondent should not be permitted to proceed to the sale of the property unless or until the sale to the appellant was set aside by an order or decree of Court.

Appeal against the Order of the Court of the Subordinate Judge of Kumbakonam dated 30th July 1918, in Appeal Suit No. 38 of 1918, preferred against the order of the Court of the District Munsif of Valangiman in E. A. No. 823 of 1917 in O. S. No. 43 of 1914 on the file of the Court of the District Munsif of Tanjore.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Kumbakonam dated 30th July 1918 in Appeal Suit No. 38 of 1918 (E. A. No. 823 of 1917 on the file of the Court of the District Munsif of Valangiman).

K. R. Narayanaswami Aiyar and *R. T. Krishnamachariar*, for Petitioner.

K. S. Jayarama Aiyar, for Respondent.

The Court delivered the following

Judgment :—Both parties in the case attached the property of same person before judgment in their respective suits against him, and both obtained decrees for money, one in the Court of the District Munsif of Tanjore and the other of Valangiman. Both parties applied in the Court of the District Munsif of Valangiman for execution of their respective decrees, but the first application of the respondent was dismissed. The appellant's application resulted in a Court sale in which he purchased the attached property.

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* A.A.A.O. No. 108 of 1918 and C.R.P. No. 1381 of 1918. 14th November, 1919.

The respondent has now again applied for a sale of the same property in execution of his decree, and the appellant has applied in those proceedings for an order that the application may be dismissed on the ground that he has become the owner of the property.

It is well established that an attachment confers no interest in the property which is in *custodia legis* and the effect of attachment is to render any private alienation void as against all claims enforceable under the attachment (See Civil Procedure Code, S. 64 and *Krishna Bai* v. *The Collector and Government Agent, Tanjore* [1]). The attachment does not prevent a transfer of the property under an order of Court and therefore an order of adjudication in the Insolvency which vests the property of the debtor in the Official Assignee is good as against an attaching creditor (See *Raghunath Das* v. *Sundar Das Khetri* [2] and *Erikulappa Chetty* v. *The Official Assignee Madras* [3]). This principle is implied in the provisions of Civil Procedure Code, S. 73 under which persons who have applied for execution of their decrees are entitled merely to share the assets realised and it is clear that in the absence of fraud, (See O. 21 R. 90) such persons cannot object to the sale of the property of their judgment-debtor by the Court.

The ownership of the property passed to the appellant from the moment that the sale was knocked down to him, and the judgment-debtor retained no interest in it which can be attached or sold (See S. 65 Civil Procedure Code). It has been stated that proceedings by way of suit are pending to set aside the decree and sale thereunder to the appellant. If those proceedings are successful the respondent may be able to enforce his decree against any interest which thereby

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[1] (1907) I. L. R. 30 Mad. 418.
[2] (1914) I. L. R. 42 Cal. 72.
[3] (1915) I. L. R. 39 Mad. 903.

Venkatasami Naidu v. Gurusami Aiyar.

becomes vested again in his debtor but he cannot now sell a merely speculative interest in these proceedings.

It has been argued that the provisions of O. 21 Rr. 58 to 63 apply to this case, and the heading of the appellants' application referred to them; but we do not think that they apply, because the ground of an application under them is that the property in question is not liable to attachment. In the present case the respondent was orginally entitled to attach the property of his debtor but he is not entitled to proceed to sale because the Court has already disposed of the property. It was also objected that the appellant not being the representative of any of the parties to suit in which the decree was passed had no *locus standi* to make this application under S. 47 Civil Procedure Code; but Mr. Jayarama Aiyar withdrew this objection in the course of the arguments, and after the recent Full Bench decision in *Veyindramuthu Pillai* v. *Maya Nadan* [1] we do not think it can be denied that the appellant having purchased the interests of the judgment-debtor is his representative for the purpose of S. 47.

We think that the appeal should be allowed and that the respondent should not be permitted to proceed to the sale of the property in question unless or until the sale to the appellant has been set aside by an order or decree of Court and we order accordingly. The execution application is dismissed. Appellant will get his costs here and in the lower courts.

The Civil Revision Petition follows A. A. A. O. No. 108 of 1918. No order is necessary.

A. S. V.

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[1] (1919) 43 Mad. 107=38 M. L. J. 32. (F. B.)

PRIVY COUNCIL.

PRESENT:—VISCOUNT FINLAY, LORD SUMNER AND LORD PARMOOR.

[On Appeal from the High Court of Judicature at Madras].

S. D. Krishna Ayyangar ... *Appellant.**

v.

S. V. Nallaperumal Pillai and others ... *Respondents.*

P. C.

Krishna Ayyangar
v.
Nallaperumal Pillai.

Company—Register of mortgages—Charge in favour of a 'Secretary'—Omission to register—Its effect—Indian Companies Act, 1882 (*Act VI of* 1882) *S.* 68, *explanation—The Companies Act,* 1862 (25 & 26 *Vict. C.* 89), *S.* 42—*Practice—Time for appeal barred but question entertained by Appellate Court—Implied extension of time to appeal—Construction of Acts—Proceedings in Council prior to enactment not admissible.*

An officer of a limited Company cannot avail himself of a mortgage or charge in his favour, which has not been registered in accordance with S. 68 of the Indian Companies Act, 1862.

The Lower Court decided that the want of registration did not prevent the enforcement of the charge in this case. The debenture-holders, although bound by the judgment, did not appeal. More than a year after the time for appeal had elapsed, when it was sought to enforce the charge, the debenture-holders, on appeal to the High Court, were allowed by that Court to raise the point of non-registration.

Held, that the High Court had by implication enlarged the time for appeal.

When the consideration of an Act is in question, no statement made on the introduction of the measure or its discussion can be looked at as affording any guidance as to the meaning of the words.

The words "as such" in the Explanation to S. 66 of Act VI of 1882 are superfluous.

Consolidated appeals from four decrees of the Madras High Court, dated April 30, 1915, reversing an order of the District Judge of Tinnevelly.

The facts of the case sufficiently appear from their Lordship's judgment, where the resolution creating the charge is set out in full. [The judgment of the High Court is fully reported in 29 M. L. J. 110]. The first four present respondents were certain debenture-holders of the Company, and the fifth respondent was the official liquidator, who was winding up the Company as such. The fifth respondent had been a party to the proceedings before the District Judge in 1912: the other four respondents were not parties. These four respondents however intervened in 1913, when the plaintiff appellant sought to enforce the order of 1912. The District Judge decided against them.

On appeal the High Court (Wallis, C. J., and Tyabji, J.,) reversed their decision the material part of the Chief Justice's judgment (in which Tyabji, J., concurred) was as follows:

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* November 3 and 5, 1910.

"The third point is that the charges having been created in favour of officers of the Company. one of them is Secretary and the other had been appointed, by resolution Manager of the Company's office and not having been registered as required by S. 68 of the Indian Companies Act of 1882, were not available to the claimants within the meaning of the explanation to that section. This objection was taken by the Liquidator in the earlier case and was overruled by the District Judge, now Mr. Justice Oldfield. It was again expressly taken in the Court in this case, but was apparently not argued in view of Mr. Oldfield's decision at an earlier stage. It is not expressly mentioned in the grounds of Appeal to us, but as the facts are such as to bring the case *prima facie* within the terms of the statutory provision, we think we ought to enforce the provisions of the section if there are applicable. The Companies Act of 1862 whilst providing penalties for failure to register mortgages and charges, did not provide that unregistered mortgages and charges should be void, but there were decisions that it would be inequitable to allow officers of the Company to enforce such charges when created in favour of themselves. The late Sir George Jessel criticised these decisions in several cases pointing out that they imposed an additional penalty not warranted by the statute and his view was finally upheld in 1887 be the House of Lords in *Wright* v. *Horton* [1]. At the time when the Indian Companies Act of 1882 was being drafted and passed into law, the other view still prevailed and the legislature endeavoured to give effect to it as nearly as possible in the words used in the decided cases. In *Exparte Valpy and Chaplin*[2] Lord Justice James after observing that the mortgage was not void for want of registration, went on. "But as it is the duty of the Company to see that every charge specifically affecting property of the Company is registered, I am of opinion that no Director, Manager or other Officer of the Company can avail himself of a charge which is not registered," and he applied the doctrine to a person who had acted as solicitor to the Company. The same language was used by the Court of Appeal *In re South Durham Iron Company* [3] where Sir George Jessel interpreted the decision as meaning that a Director, Manager or Officer cannot avail himself of the security. These were all cases in which the officer had taken a charge in respect of advances made by him to the Company and not for arrears of salary due to him.

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[1] (1887) 12 A. C. 371.

[2] (1872) L. R. 7 Ch. A. 289.

[3] (1879) 11 Ch. D. 579.

P. C.

Krishna Ayyangar v. Nallaperumal Pillai.

The explanation to S. 68 which appears to be intended to reproduce the ruling of Lord Justice James in *Exparte Valpy and Chaplin* as far as possible in his own language is as follows:—

"Omission to register under this section a mortgage or charge does not render it invalid, but the officers of the Company cannot avail themselves as such of a mortgage or charge specifically affecting property of the Company and not so registered." The words "as such" present some difficulty. If they mean as "officers of the Company" it is difficult to see what is meant of officers of the Company availing themselves of a mortgage or charge as officers of the Company unless it be that they cannot take such mortgages or charges when they are officers of the Company, which is what was laid down in the cases referred to. It is, I think, clear that the legislature was anxious to reproduce not only the substance but as far as possible the very language of the decisions and that this must be accepted as the meaning of the explanation."

Hence this appeal.

Kenworthy Brown, for appellant, submitted that the appellant was entitled to enforce his charge. The High Court had misconstrued S. 68 of the Indian Companies Act, 1862; instead of considering the terms of the Indian Statute, they had considered the effect of S. 43 of the English Act (The Companies Act, 1862) as interpreted by decisions. The words "as such" in the explanation to S. 68 indicate that the disability imposed by the Act applies only so long as the holder is an officer of the Company. In this case, under S. 137 of the Act, the appointment of the liquidator discharged all the officers of the Company. The effect of the section is not that the officer cannot take the mortgage, but that while he is an officer he cannot enforce it. The Chief Justice has erred in holding that the explanation was intended to enact the principle laid down by James, L.J., in *Exparte Valpy and Chaplin*[1].

The view expressed by James, L. J., was strenuously contradicted by the Master of the Rolls in *In re Globe New Patent Iron and Steel Co.*[2] and again by the same learned Judge and Bramwell, J., in *In re South Durham Iron Co.*[3] (both cases were decided before the enactment of the Indian Companies Act 1882,) and was finally decided to be erroneous by the House of Lords in *Horton* v. *Wright*.

Further, the words of the explanation to S. 68 do not accurately follow the language used by James, L. J. The assumption that it was intended to express his view is erroneous. Secondly, and apart from the merits, the present question is *res judicata.* The debenture-holders left the liquidator to represent them in the proceedings before the District Judge, who had this very point before him. They are estopped by explanation VI to S. 11 of the Code of Civil Procedure from raising the point again. The object of the winding up procedure is that all matters should be disposed of quickly, and under S. 144 of the Act the official liquidator represents the creditors. *In re Madras Irrigation and Canal Co.*[1]. The District Judge was right not only under S. 11 but because the application giving rise to this appeal was merely an application for execution of a previous order. *Ram Kirbal Shukul* v. *Rup Kuari* [2]. On the present application the question of priority was open to the debenture-holders: the question of the validity of the charge was not. Thirdly, the appeal to the High Court was incompetent. Notice of appeal was not given within three weeks of the order as required by S. 169 of the Act in winding-up proceedings. There is no order of the High Court extending the time.

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[1] (1872) L. R. 7 Ch. 289.

[2] (1878) 48 L. J. Ch. 295.

[3] (1879) 11 Ch. Div. 579.

[4] (1887) 12 App. Cases. 371.

Clauson, K.C., and *Dube,* for respondents: The High Court are right. The explanation to S. 68 prevents appellant from availing himself of the unregistered charge. The construction he urges involves substituting for "as such" the words "while being an officer of the Company." We submit that the true construction is to refer the words "as such" to the words mortgage or charge: the person who has the charge cannot avail himself of it "as such", but he still has his rights as an unsecured creditor. The language of the Explanation substantially reproduces that of James, L.J., in *Exparte Valpy and Chaplin* and it was intended to enact the principle laid down in that case, *viz.,* that an officer of the Company whose duty it was to register the charge cannot avail himself of it if unregistered. This will be clear on reference to the proceedings in the Legislative Council on its enactment.

[*Kenworthy Brown*: No reference to such proceedings is admissible].

Craies on Statute Law, 2nd. Edn. pp. 133, 134, *Administrator-General of Bengal* v. *Mullick* [3].

Those proceedings may be inadmissible to ascertain the intention of an enactment, but they are relevant to show the sense in which particular words, like the words "as such" here, are used.

(The Board ruled that the proceedings could not be referred to at all.)

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1. (1883) 23 Ch. D. 248 at p. 252.
2. (1883) L. R. 11 I.A. 37, 41.
3. (1895) L. R. 22 I.A. 107.

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The decision in 1912 did not constitute a *res judicata* against respondents, for they were not parties to the proceedings. They were entitled to intervene and appeal. The High Court had power to extend the time for appealing, and must be taken to have done so. The present appellants did not raise this objection in their memorandum of appeal to the High Court: and under Order 41 rule 2 could not be heard on it without leave.

Kenworthy Brown replied.

Their Lordships' judgment was delivered (December, 8. 1919) by

Viscount Finlay.

Viscount Finlay:—The question in the present case is whether a charge given to the Secretary of a Limited Company upon unpaid calls can be enforced by him although not registered as required by S. 68 of the Act of 1882 (the Indian Companies Act.) The difficulty in the case is occasioned by the explanation appended to the section, which otherwise is on the same lines as the corresponding section in the English Act. It was held by the High Court of Madras that the terms of the explanation rendered the charge not enforceable. Apart from the effect which the explanation in the Indian Act, may have in the case of a mortgage or charge to an officer of the Company, it is clear that a mere failure to register does not under either the English or the Indian Act render a mortgage or charge on the property of the Company unenforceable.

Section 68 of the Indian Act requires registration of all mortgages and charges specifically affecting property of the Company, and imposes a penalty upon any official of the Company who knowingly and wilfully authorises or permits the omission of such entry on the register. The performance of the duty to enter the mortgage or charge on the register may be compelled by order of the High Court. There is appended to this section in the Indian Act an explanation in the following terms:—

> "*Explanation.*—Omission to register under this section a mortgage or charge does not render the same invalid. But the officers of the Company cannot avail themselves as such of a mortgage or charge specifically affecting property of the Company and not so registered."

The appellant contends that the judgment of the High Court is erroneous, and that the question of construction has been conclusively settled in his favour by an order of the District Judge in 1912 which stands unreversed.

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The appellant was the secretary of the Swadeshi Steam Navigation Company, Limited. On the 27th June, 1910, a resolution creating the charge in question was passed by the managing directors in the following terms :—

> " *Resolution III.*—Resolved that, in consideration of the fact that the Honorary Secretary Krishna Ayyangar has worked for the Company without any salary, foregoing his own source of income, and of the fact that he has borrowed and advanced moneys to meet the urgent needs of the Company, the upaid calls due to the Company from the share-holders are mortgaged for the amount advanced by the aforesaid person to the Company and for interest thereon, and for the money advanced to the Company by the late Manager Kandasami and for the deposit money does from the Company to the late cash-keeper Gopalkrishna Pillai'; that the Secretary be authorised to collect the unpaid calls through Court if necessary under the power already given to him, and that out of the emounts collected the deposit money due to Gopalakrishna Pillai be paid first and that the Secretary Krishna Ayyangar and the said Kandasami Pillai Avergal shall appropriate the balance amount in the proportion of the amount to each of them."

This charge was never registered.

An order was made on the 4th July, 1911, that the Company should be wound up by the Court, and in the course of the winding up a petition was presented by the appellant to the District Judge, Mr. Oldfield, asking for an order recognising the validity of the charge. The liquidator relied on S. 68, and contended that the charge not having been registered was not enforceable by the Appellant, as he was an officer of the Company when it was taken. The District Judge rejected this contention on the ground that the explanation refers to the contingency of the officers of the Company desiring to avail themselves as such of a charge, and that it was not as secretary but as an individual that the appellant sought to avail himself of this charge, and made an order on the 27th April, 1912, allowing the claim for the reasons set out in his judgment on pages 8-10 of the Record. The liquidator further attacked the charge before the District Judge as a fraudulent perference, but the District Judge by the same order decided in favour of the appellant on this point also. No appeal was ever presented against this order. On the 25th September, 1913, the appellant applied to the District Court for an order directing the official liquidator to pay to the petitioner the amount collected or to be collected for unpaid calls. This was opposed by debenture-holders and by the liquidator on the grounds (*a*) that the

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charge was void as a fraudulent preference ; (*b*) that it had not been registered ; and (*c*) that it was not entitled to priority over debentures previously issued. The District Judge, Mr. Waller, refused to entertain grounds (*a*) and (*b*) as they had been decided by the order of the 27th April, 1912, but heard argument on ground (*c*) and on the 22nd December, 1913, decided that the appellant was entitled to priority over the debenture-holders. On appeal against this decision to the High Court at Madras the judgment now under appeal was delivered on the 30th April, 1915. The judgment deals with two points. The first was as to the claim of the debenture-holders to priority over the charge. On this the High Court decided in favour of the present appellant and against the debenture-holders. The second point was that of non-registration, which the Court allowed the debenture-holders to rise on this appeal. The Chief Justice, in delivering judgment, referred to the conflict on the interpretation of S. 43 of the English Act which had arisen between Sir George Jessel and James, L.J., as to mortgages and charges to officers of the Company, and said that the explanation appeared to be intended to reproduce the ruling of James, L.J., in *Exparte Valpy and Chaplin* [1]. He then proceeded as follows :—

> "The words 'as such' present some difficulty. If they mean 'as officers of the Company', it is difficult to see what is meant by officers of the Company availing themselves of a mortgage or charge as officers of the Company unless it be that they cannot take such mortgages or charges when they are officers of the Company, which is what was laid down in the cases referred to. It is, I think, clear that the Legislature was anxious to reproduce not only the substance, but as far as possible the very language of the decisions, and that this must be accepted as the meaning of the explanation."

It is undoubtedly true that the very point which has now been argued before their Lordships was argued before the District Judge in 1912 and then decided in the appellant's favour, and there has been no appeal against that decision. Ought this, as the appellant contends, to make an end of the matter? The point is of considerable importance as a matter of practice. The order of the 27th April, 1912, which was made after argument on behalf of the appellant and the official liquidator, decided that the want of registration did not prevent the enforcement of the mortgage. Their Lordships think that the official liquidator must be regarded as having represented on that application the debenture-holders and creditors as well as the Company, and that so long as the decision stands it is conclusive in the winding-up on all parties so represented. The official liquidator did not appeal. If any debenture-holder or other person interested desired to attack the decision, it was open to him to ask that he should be made a party and should have leave to appeal. No such application was made. But when the appellant applied on the 28th September, 1913, for enforcement of the order made on the 27th April, 1912, the debenture-holders, on their appeal from the order of the 22nd December, 1913, were allowed by the High Court to raise the point of non-registration which had been decided against them in 1912. (See the judgment now under appeal, Record, pp. 96 & 97.) The proper course to have taken in order to raise this point would have been to get leave, notwithstanding the lapse of time, to appeal from the judgment of the 27th April, 1912. But the matter is merely one of practice. The High Court could have regularised the proceedings by extending the time, and giving leave to appeal from the 1912 decision, and they considered the point without going through this process. Their Lordships are not prepared to reverse the decision of the High Court merely because the proper course in point of practice was not taken, and they propose to deal with this appeal on the footing that the respondents were entitled to raise in the High Court their objections under S. 68. Whether leave should have been given to appeal would have been a matter of discretion, but the High Court appear to have had no doubt that they should allow the point to be raised. Their Lordships have, therefore, dealt with the case on this basis, and now proceed to consider the appeal on its merits.

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[1] L. R. 7 Ch. A. 289.

The question of the effect of non-registration in cases where the charge was taken by an officer of the Company must be decided upon the terms of the explanation to S. 68, but in order to make the judgment of the Chief Justice intelligible it is necessary to refer shortly to the English decisions which he quotes in his judgment.

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The English section—Section 43 of the Companies Act of 1862—corresponds to Section 68 of the Indian Act *minus* the explanation. In 1872, in *Valpy's case* James, L. J., held that as the unregistered charge had been taken by a person acting as solicitor to the Company, he could not avail himself of it, and in 1876 in *Re the Native Iron Ore Company* [1] a mortgage in favour of directors of the Company was held not enforceable as the registration was defective, there being no description of the property. These decisions proceeded on the supposed principle that, as it is the duty of officers of the Company to see to registration of mortgages, if they fail to do so in the case of mortgages to themselves they cannot be permitted to enforce them. But in 1878 in *In re Globe New Patent Iron and Steel Co.* [2], Sir George Jessel expressed his dissent in the strongest terms from these two decisions, and in 1879 in *In re South Durham Iron Co.*,[3] Sir George Jessel and Bramwell, L. J., (*dissentiente* Baggallay, L.J.,) adhered to the view that these two cases had been improperly decided. The whole Court, however held that they were binding authorities, but distinguishable on the facts of the case then before the Court.

This was the state of the authorities when the Indian Companies Act became law. The High Court in the present case took the view that the explanation was intended to reproduce the ruling of James, L. J., and must be construed accordingly. The construction of the explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. The controversy was terminated, so far as the English Courts are concerned, by the decision of the House of Lords in 1887 in *Horton* v. *Wright* [4], which is an express and final decision that Sir George Jessel's view was right. Of course this decision can have no effect upon the present case. If the effect of the explanation in the Indian Act of 1882 was to adopt as law in India the view of James, L. J., there is an end of the matter in the absence of further legislation. If the explanation has this effect it must be carried out, and the fact that the enactment was passed in consequence of what the subsequent decision of the House of

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1. (1876) 2 Ch. Div. 345.
2. (1878) 48 L. J. Ch. 295.
3. (1879) 11 Ch. Div. 579.
4. (1887) 12 A. C. 371.

Lords showed to be a misconception of the English law would be quite irrelevant. The question is, what does the explanation mean? No statement made on the introduction of the measure or its discussion can be looked at as affording any guidance as to the meaning of the words.

The question really narrows itself to this: What effect should be given to the words "as such" in the explanation?

The appellant contended that the words "as such" relate to the words "the officers of the Company," and that the effect is to enact that the officers cannot avail themselves as such officers of unregistered mortgages or charges taken by them in their capacity of officers of the Company. This is the most natural meaning of the words. It was adopted by Mr. Oldfield, the District Judge, in his decision of the 27th April, 1912, and in his judgment he suggested circumstances in which he thought the words so read would take effect. The contingency referred to by Mr. Oldfield was the retention by the Company of redeemed debentures or charges in the name of an officer. Such a contingency, however, is remote even if possible and it appears to their Lordships that it would be a mistake to read the words as directed to it.

The respondents contended that the words "as such" refer entirely to the following words "of a mortgage or charge," and that their effect is that the officers of the Company cannot avail themselves of a mortgage or charge as such unless it has been registered. It was suggested that the words were introduced in order that it might be open to the officer of the Company to avail himself of the instrument as evidence of a debt or for some other purpose of that kind.

Their Lordships are unable to accept this construction. It seems to them to be at variance with the language of the explanation. The structure of the sentence is such that the words must be read as referring to what precedes and not to what follows them. To hold otherwise would be to put an unjustifiable strain upon the clause, which must be read according to the ordinary usages of the English language. Indeed, the intervention of the word "of" between the words "as such" and the words "a mortgage or charge" appears fatal to this theory.

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Yet another construction has been put forward, *viz.*, that "as such" means "while such," and prevents the enforcement of the security by an officer of the Company while he remains such officer. If this view be correct, the appeal would succeed, as, owing to the winding-up of the Company, the appellant had ceased to be an officer of the Company before the claim was put forward. Their Lordships do not see their way to construing the words in this sense as relating merely to time.

There is a fourth possible construction of these much debated words and it is that which after much consideration their Lordships adopt. It is this. The words "as such" should not be read as denoting the capacity in which the officers take the mortgages or charges. They are introduced simply as giving the reason for the inability to take advantage of the securities. The reason underlying the judgments, which the explanation appears to have been intended to crystallise into the form of an enactment, was that officers entrusted with a duty as to registration could not take advantage of a security to them as to which this duty had been neglected by them. The words "as such" relate simply to the prohibition under which they are as officers. The officers are forbidden as such because they are officers and were therefore bound to see to registration, to avail themselves of unregistered securities. The words in this sense are unnecessary but not insensible. The drafting is bad, but having regard to the extreme improbability that it was intended to meet such a contingency as that put by Mr. Oldfield in his decision of the 27th April 1912 and to the fact that the construction now suggested would as the Chief Justice in the Court below points out, embody the effect of the judgments of the Court of Appeal, which were in 1882 when this clause was enacted recognised as of binding authority, their Lordships think that this last construction should be adopted. The language of the explanation is to some extent taken from these judgments, as the Chief Justice remarks, and this strengthens the probability that it was intended by the language used to reproduce their effect.

Their Lordships therefore are of opinion that the judgment of the High Court of Madras is right and will accord-

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ingly humbly advise His Majesty that these appeals should be dismissed with costs.

Solicitors for Appellant :—*John Josselyn.*

Solicitors for Respondent :—*H. S. L. Polack.*

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PRIVY COUNCIL.

PRESENT:—LORD SHAW, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

Nawab Bahadur Muhammad Rustam Ali Khan,
since deceased (now represented by Nawab
Muhammad Sajjad Ali Khan and others),
and another ... *Appellant.**

v.

The Municipal Committee of Karnal City ... *Respondent.*

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Municipal Committee of Karnal City

Highway—Dedication to the public—Intention to dedicate—Cannot be inferred from permissive use by tenants or their visitors—Dedication to a section of the public insufficient " street "—"public street"—Punjab Municipal Act, 1911, *(Act III of* 1911) *Ss.* 3. 171.

In cases where the existence of a public highway is in issue, it is of crucial importance to distinguish between the grant to the public as such of right of way and the permission which naturally flows from the use of the ground as a passage for visitors to or traders with the tenants whose shops abut upon it.

A person in dedicating land to public use may limit the purpose of the dedication as he wishes, but the dedication must be to the public as a whole. This cannot in law be a dedication to a limited part of the public.

In order to constitute a valid dedication to the public of a highway by the owner of the soil, there must be an intention to dedicate. User by the public is only evidence of such intention.

Appeal from a decree of the Punjab Chief Court (April 12, 1916) reversing a decree of the Court of the District Judge Karnal. (Dec. 22, 1912).

The facts of the case sufficiently appear from their Lordships' judgment. That judgment however is incorrect in stating that the District Judge affirmed and the decree of the Chief Court disaffirmed, the existence of a publc street: on the contrary the District Judge negatived the existence of a public right of way and gave plaintiff (the Nawab, now Appellant) an injunction: but on appeal the Chief Court (Scott-Smith and Johnston, J.J.), reversed the decision and dismissed the plaintiff's suit.

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* October 30th 1919.

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De Gruyther, K. C. and O'Gorman, for Appellants: There is no evidence here from which a dedication to the public of the space between the shops can properly be inferred. The Nawab has held this market for a long time, but this is the first time that his ownership has ever been disputed. Before Punjab Act III of 1911 there was an Act XX of 1891 (Punjab) dealing with the same matter. Vide Ss. 3 (g) and 76 (g): but between 1891 and 1911 the Nawab submitted to no acts impugning his absolute ownership. So far from being dedicated, the enclosure had gates, which were shut at night. The way in suit is an occupation way, not a highway.

[*Sir Lawrence Jenkins.*—If the Municipal Committee are right you would have no right to close the gates. You have to ascertain if the Nawab had an intention to give].

The right enjoyed by members of the public was limited to coming to the shops, it was enjoyed in the right of the tenants, not as members of the public.

Reference was made to *Pool* v. *Hutchinson* [1], *Anderson* v. *Juggodumba Devi* [2], *Municipal Commissioner of Bomay* v. *Mathurabhar* [3], *Kalidas* v. *Municipality of Dhanduka* [4].

Sir Lawrence Jenkins referred to the Indian Easements Act. 1882 Act, V of 1882, Ss. 21 illustration (b) and to *Barraclough* v. *Johnson* [5].

The Respondents did not appear.

Their Lordships judgment was delivered (December 4. 1919) by

Lord Shaw.

Lord Shaw :—This is an appeal from a decree of the Chief Court of the Punjab dated the 12th April, 1916, reversing a decree of the Court of the District Judge, Karnal, dated the 23rd December, 1912.

The respondents in the appeal are the Municipal Committee of Karnal City. The proceedings had reference to an alleged public street in Karnal. The District Judge affirmed, and the decree of the Chief Court disaffirmed, the existence of such a public street.

The Municipality has made no appearance by Counsel at the Bar of the Board. Their Lordships are in the position of

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1. (1840) 11 M. W. 827.
2. (1860) 6 Cal L. R. 282.
3. (1906) I. L. R. 30 Bom, 358.
4. (1882) I. L. R. 6 Bom. 686.
5. (1838) 8 A. & E. 99.

having to decide what *ex facie* is an important question of public right, in the absence of those who in the ordinary course would defend it. This has added to the difficulties of the case.

By S. 3, Sub-S. 13 of the Punjab Municipal Act 1911, "street" is defined to mean—

> "Any road, foot-way, square, court, alley or passage, accessible whether permanently or temporarily, to the public, whether a thoroughfare or not"

And by the same sub-section "public street" is defined to mean any street—

> "(I) over which the public have a right of way; or
>
> "(II) heretofore levelled, paved, metalled, channelled, sewered, or repaired out of the municipal or other public funds; or
>
> "(III) which, under the provisions of S. 171, is declared by the municipality to be, or under any other provisions of this Act becomes a public street."

On one outstanding fact of the case there would appear to be no difficulty in the judgments of the Courts below, namely, that, apart from the question now raised as to the street, the appellants are the absolute owners of Nawab Ganj, a market in the city. Notwithstanding the protest of the appellants, the Municipal Committee recently constructed a metalled road through Nawab Ganj on the plea that the area over which the road was laid was a "public street" under the Municipal Act as above quoted.

The Ganj is built in a form of a katra or rectangular close to which entrance is obtained by four gates. One of these gates was missing at the institution of the suit. The others existed and were shut at night. Round the close was a series of shops which were leased mostly to grain merchants. The enclosure thus formed is a narrow courtyard, on the floor of which the tenants pile up their grain in separate heaps, and under the courtyard there are masonry bins for storage. There seems little doubt that the solum of the courtyard was necessary, or at least most valuable, to the tenants of the shops, and these tenants not only paid rent for the shops, but paid dues for the use of the courtyard.

The Municipality have under their Act the ordinary powers of draining, cleaning and lighting. Prior to the operations complained of they never exercised any of such powers over the ground in issue. They never drained the courtyard. In the correspondence preceding the action, and in the pleading of the suit, they claimed, however, that the courtyard was municipally lighted; but it turned out, and has been so found by both Courts, that the only lighting was by two lanterns put up by or for a member of the Municipal Committee for his own convenience. As the learned Judges of the Chief Court say, "there is no evidence that the mandi was properly lit by the Municipal Committee, and the putting up of these two lanterns does not prove that the place was a public one." The cleaning of the courtyard was never done by the municipality : on the contrary, the responsibility for that was laid by them upon the appellants' predecessor. This important matter will be presently referred to.

A plot of ground of this character owned by onecitizen, and by its nature accessory to shop property, and let by him as such to his shop-tenants, and neither drained, lighted, nor cleaned by the municipality, would not appear in ordinary circumstances to form a public street. The only foundation for such a plea would be that which has been affirmed by the Court below, namely, that there existed through this Ganj a public right of way, and that this had been acquired by reason of dedication as such by the owner. The question in the case is whether this view is correct.

On this question it is admitted that there has been no dedication expressly or in writing. It appears also to be quite clear that that there is no user of long duration from which an inference of such a dedication to the public would naturally arise.

Their Lordships have, however, examined the evidence of dedication relied upon by the Chief Court, and it may be at once stated that they found nothing therein which is adequate to support such a transaction.

The Board do not enter upon details, but feel inclined to cite the principal example of the evidence relied on by the Court below. It is that of Mr. Ram Chander. In the judgment appealed from it is stated "that he frequently passed through that part of the kacha road which previously existed

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where the pucca road now is. He is a perfectly independent witness, and we have no reason for disbelieving him."

Their Lordships entirely accept the description of the witness. On examination of his evidence, however, it turns out that for a few years back he has gone from his bungalow to his office "generally *via* Nawab Ganj Mandi." And he says :—

> "There used to be a kacha road previously at the place where the Municipal Committee has now built a pucca road. I do not know whether it is a public road or not. I often pass by that road."

After explaining that his office has been in the neighbourhood only for the last seven or eight years, he adds :—

> "There was no fixed way before the construction of the pucca road. I used to pass by the way I could find. There was no drain on any side. Previously corn was generally stored on the road also. Some passage was left . . . . As there was no particular pucca road and drain, corn was generally stored a little way off the centre. . . . Most of the Banias objected to my passing. When I passed over the corn the shop-keepers objected, saying 'why do you go over the corn."

Their Lordships cite this as a sample not of evidence of dedication but of evidence which is wholly insufficient to suggest dedication to the public. It is in such cases of crucial importance to distinguish between the grant to the public as such of a right of way, and the permission which naturally flows from the use of the ground as a passage for visitors to or traders with the tenants whose shops abut upon it. In the present case it appears to their Lordships extremely doubtful whether the term "dedication" can with propriety be applied to what took place. If the term be employed, it can only be in this sense, that the dedication of the solum of the courtyard was dedication not to the public, but to the uses of the shop-keepers and their customers, the principal use being the storing and display of grain. At night when business was over, the place was shut up and the gates were closed.

It is true that members of the public would get access to a place which was used by customers, and might or might not pass through it. From that on the point of dedication, nothing can be inferred. A person in dedicating land to public use may, of course, place such limits as he wishes upon the dedication, if he makes those limits clear and definite. That is to say, he may announce to the public that a certain road is

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dedicated to it has access, say, to a particular building or for a particular purpose. But there can be no such thing in law as a public right of way, constituted by dedication to only a section of the public. As Baron Parke said in *Poole v. Huskinson*[1].

> "There may be a dedication to the public for a limited purpose, as for a bootway, horse-way, or drift-way; but there cannot be a dedication to a limited part of the public."

A further dictum of that very learned Judge may be also cited :—

> "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate—there must be an *animus dedicandi*, of which the user by the public is evidence, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment."

Upon this point the evidence appears to their Lordships to be substantially all in one direction. According to it, intention to dedicate (apart from the user, of which a sample has been given) there was none. On the contrary, so recently as the year 1902, the municipality itself treated the Ganj not as public but as private property. On an application of the shop-keepers therein, the municipal authority wrote to the proprietor of the Ganj asking that a well should be protected by a wooden structure, while as to the right of way, etc., the municipality put the matter thus:—

> "The way in the market is in a very bad condition, and the sweeper deputed by the State does not do any work. A bad smell is spreading in the market. It is requested that the way in the market should be paved with concrete because the income of the octroi duty of the market is deposited in the treasury of the Nawab. If you be so generous as to get this amount deposited in the Municipal Fund, the Municipal Fund shall be responsible for cleanliness and for getting the road in the market made pucca, otherwise you should make your own arrangements in connection therewith."

No date is assigned by the Court below for the alleged dedication; but it cannot be said that it occurred after the date of this letter; and the letter itself is a negation of the idea of dedication to the public having been made.

Notwithstanding this, the municipality entered upon the ground and built a road across it—in spite of the objection of the Nawab and without taking any steps under this statute to acquire the ground. In the opinion of their Lordships, that

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1. (1843) 11 M. & W. 827, 830.

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was a trespass. The ground still remains the private property of the appellants.

Their Lordships will humbly advise His Majesty that the appeal be allowed, and that the decree of the Chief Court of the Punjab, dated the 12th April, 1916, be recalled with costs, and the decree of the District Court be restored. The respondents will pay the costs of this Appeal.

Solicitors for Appellants :—*Ranken Ford, Chester & Chester.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

N. P. T. Cheria Kunhammad and another ... (*Appellants*)*
(*Defendants 3 and 4*).

v.

Kunhinni *alias* Kizhakkayil Nair and another... *Respondents.*
(*Plaintiff and defendant* 5).

Cheriar Kunhammad v. Kunhinni.

Malabar Law—Karnavan—Melcharth—Grant before expiry of lease—Successor when bound—Necessity—Benefit.

In the absence of necessity or benefit to the tarwad, a melcharth given by a Karnavan before the expiry of the prior lease will not bind the succeeding Karnavan whether the grantor was or was not alive at the time when the prior lease expired S. A. 774 of 1917 not followed.

Cheria Chirikandan v. *Krishnan Nambiar* [1]. *Moideen Kutti* v. *Kunhi Koyan* followed [2].

Second Appeal against the revised decree of the Court of the Temporary Subordinate Judge of Tellicherry in Appeal Suit No. 554 of 1913 preferred against the decree of the Court of District Munsif of Payyoli in O. S. No. 432 of 1911.

K. P. M. Menon for Appellants.

C. Madhavan Nair for Respondent.

The Court delivered the following,

Sadasiva Aiyar, J.

Judgments :—*Sadasiva Aiyar, J.* :—Defendants 3 and 4 are the appellants. The plaintiff is the Karnavan of an *edam* and he sued to recover the *edom* property which had been leased to the 1st defendant in 1899 to take effect on the expiry of a prior lease granted in 1891 and which would expire in the ordinary course in 1903. It was found by the lower Appellate

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' S. A. 774 of 1917 not followed.

* Second Appeal No. 1857 of 1918. Dated 21st Jan, 1920.

[1] (1912) 27 M. L. J. 690.

[2] (1914) 27 M. L. J. 691.

Cheria Kunhammad v. Kunhinni.

Sadasiva Aiya, J.

Court that there was no necessity or justification for granting that lease in 1899, four years before the term of the prior lease expired. The question is whether in law the plaintiff who has succeeded to the Karnavastanom in 1907 is entitled to treat the lease granted without justification or necessity by the prior Karnavan, 5th defendant, as not binding on the tarwad. In *Cheria Chirikandan* v. *Krishnan Nambiar* [1], Sundara Aiyar, J., and myself held that where a lease had been granted for five years and a melcharth was granted after three years from the beginning of the first lease and two years before the expiry of that lease term to another tenant, such a second lease was not binding on the succeeding Karnavan. In that case, no doubt the second lease was granted to a man other than the person who was holding under the first lease. Mr. Menon argued that we were probably led to the conclusion in that case adverse to the second lease by a desire to put an end to the undesirable practice of Karnavans granting Kanoms and leases to third persons over the heads of the lessees and Kanomdars in possession. But there is nothing in the judgment in *Cheria Chiri Kandan* v. *Krishnan Nambiar* [1] to indicate that the fact that the second lease was given to a person other than the original lessee influenced our opinion. I think that Sundara Aiyar, J., (who pronounced the judgment which I adopted) has given two reasons why such an exercise of power in anticipation by the Karnavan is not binding on the tarwad. He first says : "It is not alleged that there was *any necessity for doing so or that the tarwad derived any benefit from the transaction*". So, if such an allegation is not made and proved, it is implied in the above observation that would be a sufficient ground for holding that the transaction would not be binding on the tarwad. Then that ground is sought by us to be fortified by the further consideration that the Karnavan who gave the second lease may be succeeded by a different Karnavan even during the continuance of the term of the first lease, and that "it is impossible to countenance the proposition that the Karnavan for the time being can tie down the discretion of those that are to succeed him in the management by granting leases of family lands, when there is absolutely no reason for doing so, and the lands are being held by tenants on leases which are still in force." The judgment was pronounced on 19th July 1912. Taking advantage of this second reason mentioned in the judgment about the danger to the rights of the succeeding Karnavans, an argument was elaborately advanced in the case reported in the next page *i.e., Moidin Kutti* v. *Kunhi Koyan* [1] that if the Karnavan who anticipated the expiry of the first lease happened to be alive and still holding his position as Karnavan when the term expired, the melkanom or melcharth already granted need not be supported by necessity or justification to be binding on the tarwad. Ayling and Hannay, JJ., in a short judgment decided on this contention as follows: "It is found that there was no family necessity to justify the melcharth Ex. B: and we must hold that the transaction is not binding on the successor of the Karnavan who executed it *whether the latter did or did not survive the expiry of the prior Kanom.* The appeal is dismissed with costs." Mr. Menon however relied upon a yet later decision of Phillips and Krishnan, JJ., in Second Appeal No. 774 of 1917 dated 22nd November 1918. In this case the decision in *Cheria Chirikandan* v. *Krishnan Nambiar* [2] is referred to and it was interpreted as implying that if the grantor lived after the term of the prior Kanom expired and was thus in a position to grant the melcharth (and provided that the grant was not of such a nature as to improperly prejudice the successor) it is valid. Somehow, reference is not made in S. A. No. 774 of 1917 to the decision of Ayling and Hannay, JJ., in *Moidin Kutti* v. *Kunhi Koyan* [1]. A Karnavan's ordinary legal right is that of management of the tarwad affairs and properties and in my opinion it is difficult to hold that four years before a lease expired, it is the proper thing or an ordinary incident of management to grant a second lease to begin on the expiry of the former lease. That was the principle on which the decision in *Cheria Charikandan* v. *Krishnan Nambiar* [2] was based. It is only when proper necessity or justification can be urged to invoke what can be called the extraordinary powers of dealing with the property (which is

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[1] (1912) 27 M. L J. 690.

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[1] (1914) 27 M. L. J. 691.

[2] (1912) 27 M. L. J. 690.

Sadasiva Aiyar, J.

being held by a tenant under a lease which has not expired) that such an action can be held valid against the tarwad. It is also significant that this contention, that necessity need not be shown where the Karnavan continues in power at the expiry of the first ease, seems not to have been argued before the lower Appellate Court but was raised for the first time in the second appeal memorandum. As the lower Courts have found that there was no necessity or justification for the attempt to deal with the property before the expiry of the former term, I would uphold the lower Appellate Court's judgment, expressing my respectful dissent from the decision in S. A. No. 774 of 1917 and I would dismiss the second appeal with costs, the contention relating to the two other documents Ex. 1 and IX not being sustainable on the facts found.

Spencer, J.

Spencer, J:—As regards the judgment in Second Appeal No. 774 of 1917 which has been quoted to us in support of the premature grant of a melcharth if the time for the renewal of the lease or Kanom is anticipated by a Karnavan in such a way as to have the effect of fettering his successor's management of the estate, though a renewed lease or Kanom may be bad on account of such anticipation of the Karnavan's powers, it does not to my mind follow that in cases where there is no successor and the same Karnavan continues in office till after the expiry of the term the instrument is necessarily a good one. Sundara Aiyar, J., in *Cheria Chiri Kandan* v. *Krishnan Nambiar* [1] observed that there was no justification for the granting of a melcharth two years in advance of the expiration of the prior lease. In that case it was not alleged that there was any necessity for it or that the tarwad derived any benefit from the transaction. *A fortiori* in the present case, where no explanation has been offered for anticipating the time of the renewal of the lease by four years, it is difficult to see how the 5th defendant's conduct can be justified. I agree that the Second Appeal should be dismissed with costs.

A. V. V.

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[1] (1912) 27 M. L. J. 690.

IN THE HIGH COURT OF JUDICATURE, AT MADRAS.

PRESENT:—MR. SIR JOHN WALLIS, CHIEF JUSTICE, AND MR. JUSTICE KRISHNAN.

Donepudi Subrahmanyam ... *Appellant* * (*4th defendant*).

v.

1. Nune Narasimham and others... *Respondents* (*Plaintiffs and Defendants 1 to 3*)

Donepudi v Subrahmanyam v. Narasimham.

Limitatian. Act, Ss. 4 and 12 (2)—Appeal—Deduction of time requisite for obtaining copies—Judgment pronounced in Vacation—Application for copies after re-opening of court—Deduction of time.

The court below pronounced its judgment on 21-12-1918, the first day of the Christmas vacation. The appellant applied for copies of the judgment and decree on 7th Jan. 1919 when the Court re-opened after the vacation and obtained the copies in due course. The appellant appealed to the High Court with the copies so obtained and claimed to deduct the time from 22-12-1918 to 6-1-1919 from the period prescribed for appealing. *Held* that the appellant was not entitled to the deduction of time claimed by him. The "time requisite for obtaining a copy" in S. 12 (2) of the Limitation Act means the time reasonably requisite for the purpose and a party cannot ordinarily claim deduction of any period antecedent to his presenting an application for copies

Second Appeal sought to be preferred against the decree of the District Court of Kistna in A. S. No. 33 of 1918 preferred against the decree of the Court of the Subordinate Judge Bezwada in O. S. No. 23 of 1916.

B. Somayya, for Appellant.

P. Venkatarama Rao, for Respondents.

The court delivered the following

Wallis, C. J.

Judgment:—*Chief Justice*:—The judgment of the lower Appellate Court in this case was pronounced on 21st December 1918, the first day of the Christmas vacation, and under S. 12 (2) of the Limitation Act time began to run from the following day. The fact that the judgment was pronounced in the vacation made no difference in this respect, as the only provision with regard to the vacation is that under S. 4, if the prescribed period expires on a day when the Court is closed the appeal may be preferred on the day when the Court re-opens. The appellant applied for copies of the decree and judgment on the 7th January 1919 which he duly obtained, but even excluding the time taken in obtaining them, he is admittedly out of time, unless he is entitled to add the days when the Court was closed for the Christmas vacation and to

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*S. R. No. 18328 of 1919. .. 10th February 1920.

Donepudi Subrahmanyam v. Narasimham.

Wallis, C. J.

treat them as part of the time requisite for obtaining copies of the decree and judgment within the meaning of S. 12. It has been held by Sankaran Nair, and Ayling, J.J., in *The Tanjore Palace Estate* v. *Andi Ramiah Chetty* [1] that he is not entitled to do this, and we entirely agree with that decision. It was no doubt held in *Saminatha Ayyar* v. *Venkatasubba Ayyar* [2], where the judgment under appeal was delivered late on the day before the Christmas vacation and an application was made for copies on the 7th of January the day the Court re-opened, that the appellant was entitled to exclude, not only the time actually taken in obtaining the copies, but also the whole of the Christams vacation during which the Court was closed, when he could not apply for copies even if he had wished to do so. That case may be distinguished on the ground that there the copies were applied for on the re-opening day and in this case not until some days later; otherwise we should have to consider whether we ought to follow it. What we have to see in all these cases is what was the time requisite for obtaining copies within the meaning of the section and by "requisite" I understand reasonably requisite. It was observed by Wilson and Beverly, J.J., in *Gunga Dass Dey* v. *Ramjoy Dey* [3] that no hard and fast rule can be laid down to meet all cases that occur under this provision but I think it may be said that generally, if not invariably as held in *Bechi* v. *Ahsanullah Khan* [4], the time requisite for obtaining copies cannot include any period antecedent to the appellant's asking for copies in the usual way. The appellant is under no duty to make early application ; he may apply at any time, even on the last day of the prescribed period if he so chooses ; and even if the period expires on a day when the Court is closed he may apply for copies on the re-opening day and still be within time, as held in *Siyadat-un-Nissa* v. *Muhammed Mahmud* [5] *Tukaram Gopal* v. *Pandurang Sadaram* [6] and *Pandharinath* v. *Shankar* [7]. In the present case the appellant had some eighty days between the re-opening of the Court and the expiry of the prescribed period in which he could have applied for copies, and he did in fact apply for them a few days

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[1] (1911) 11 Indian Cases 339.
[2] (1903) I. L. R. 27 Mad. 21.
[3] (1885) I. L. R. 12 Cal. 30.
[4] (1890) I. L. R. 12 All. 461 at 471.
[5] (1897) I. L. R. 19 All. 342.
[6] (1901) I. L. R. 25 Bom. 584.
[7] (1901) I. L. R. 25 Bom. 586.

Subramanyam
v.
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after the re-opening. In these circumstances I fail to see how the Christmas Vacation can be included in the time reasonably requisite for obtaining them, unless we are prepared to go so far as to say that all days on which the Court was closed during the prescribed period before the appellant applied for the copies must be included in the time requisite for obtaining copies on the ground that the appellant could not have applied for copies on those days even if he had desired to do so. This would defeat the intention of the Legislature that time should run on days when the Court is closed and would be a very strained interpretation of the words "time requisite" as used in the section which, in my opinion, means time reasonably requisite on the facts of the case. The appeal is barred and is dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING, AND MR. JUSTICE COUTTS TROTTER.

Yalla Krishnamma ... *Appellant* * *(Plaintiff)*.

v.

Kotipalli Mali ... *Respondent (Defendant)*.

Krishnamma
v.
Kotipalli
Mali.

Transfer of Property Act S. 55—Vendor and purchaser—Execution of registered conveyance—Non-payment of price—Suit by vendee for possession—Form of decree.

Defendant sold immoveable property to plaintiff by a conveyance which was duly registered. The plaintiff did not pay the purchase money but sued for recovery of possession of the property from the vendor. The court below passed a decree for possession conditional on plaintiff's paying the purchase money. Plaintiff appealed. *Held* that the plaintiff was entitled to an unconditional decree for possession of the properties sold to him. *Subrahmania Aiyar* v. *Poovan* [1] *Rama Aiyar* v. *Vanamamalai Iyer* [2] not followed. *Velayudha Chetty* v. *Govindasami Nayakan* [3] *Kandasami Pillai* v. *Ramasami mannadi* [4] Ref.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Cocanada in A. S. No. 120 of 1918 preferred against the decree of the Court of the District Munsif of Amalapuram in O. S. No. 943 of 1916.

K. Kamamurthi for Appellant.

A. Satyanarayana for Respondent.

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* S. A. No. 499 of 1919. 8th January, 1920.

[1] (1902) I. L. R. 27 M. 28.

[2] (1915) 27 I. C. 336.

[3] (1910) I. L. R. 34 M. 543.

[4] (1918) 36 M. L. J. 318.

Krishnamma v. Kotipalli Mali.

The court delivered the following

Judgment.—The short point in the Second Appeal is whether a plaintiff who has not paid the purchase-money of a property which has been conveyed to him can maintain a suit for possession without paying for it or submitting to a decree for payment or a condition attached to the decree as to the purchase-money which he had agreed to pay. No doubt it seems very reasonable that a man who comes to enforce his right against the property should be expected to do what is just, and pay the price. But we think that there is no doubt whatever that the law in this country, following the English law, is otherwise. The two benches of this court in *Subrahmania Iyer* v. *Poovan*[1] and in *Rama Aiyar* v. *Vanamamalai Aiyar* [2] have held that in such cases as the present, the vendee can be compelled to pay the purchase money in extinction of the lien of the vendor before he gets a decree for possession. That must proceed on two assumptions.

The first is that the vendor is entitled to a possessory lien in respect of his unpaid vendor's lien and the other is that you can give relief against the consequences laid down in the Transfer of Property Act as following from a transfer by sale deed and conveyances. With regard to the first of these propositions, we think that it is an oversight of the learned Judges to have treated an unpaid vendor's lien which only creates a charge on the property sold, as a possessory right exerciseable in the face of the claim of the vendee to possession. With regard to the second, the matter was very carefully considered by two learned Judges of this court, the late Chief Justice and the present Chief Justice in *Velayudha Chetty* v. *Govindaswami Nayakan* [3] where they point out that the broad proposition involved is this: Can courts give equitable relief to mitigate or suspend the consequences laid down by a statute, and they came to the conclusion that such a proposition as that the plain words of the statute could be whittled away by the application of the so called equitable doctrines, was an absolutely untenable one and they expressed their dissent from

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1. (1904) I. L. R. 27 Mad 28. 2. (1914) I. C. 336.
3. (1910) I. L. R. 34 Mad. 543.

Krishnamma v. Kotipalli Mali.

the contrary decision in *Baijnath Singh* v. *Paltu* [1]. The same principle was really involved in the decision of the Full Bench of this Court in *Kandasami Pillai* v. *Ramaswami Mannadi* [2]. That was a case where it was part of the terms of a lease deed or demise that the lessee should discharge a prior hypothecation on the land. It was found that this was not in the nature of a condition precedent but was merely a concurrent covenant with the other obligations of the parties to the document; and it was held by the Full Bench that the creation of a present demise involved the right to immediate possession by the person to whom the demise was made unless it could be shown that any of the stipulations imposed upon him for performance, were in the nature of conditions precedent.

The learned Judge in this case, besides the decisions in Madras which we feel constrained to hold is no longer good law in view of the Full Bench ruling and of the ruling in *Velayutha Chetty* v. *Govindasawmy Naicken* [3] refers to *Nilmadhab* v. *Haraprasad* [4]. We think that the learned Judge clearly misconstrued the effect of the decision because the ground upon which that judgment really proceeds is this:— that in that case there was evidence of an intention that a registered document was not to take effect *ipso facto* at once on execution and was not intended to be performed till something else had been done. Now if there be any evidence in this case that it was the intention of the parties that this sale-deed which is absolutely unqualified on the face of it should only come into effect when in fact the consideration had been paid, no doubt any court would have the right to give effect to such a contract and to hold that there was such an intention? The clause of the Transfer of Property Act which enumerates the respective duties of vendor and vendee is expressly qualified by the words "in the absence of a contract to the contrary". The Calcutta case held on its particular facts that there was a contract and that therefore clearly the consequences of the statute did not necessarily ensue.

The appeal must be allowed with costs.

A. V. V.

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[1] (1908) I. L. R. 30 All. 125.
[2] (1918) 36 M. L. J. 318.
[3] (1910) I. L. R. 34 Mad. 543.
[4] (1913) 17 Cal. W. N. 1161=19 C.L.J. 146

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE MOORE.

Kalavakolanu Seetamma and others ... *Appellants** (3 to 6 *defendants*).

v.

Poduri Narayanamurthi Somayajulu ... *Respondent* (*Plaintiff*).

Seetamma
v.
Narayanamurthi,

Arbitration in pending suit—Award—Covenant in—Binding nature on parties to suit and their representatives—No decree upon award—Award simply recorded by Court—Effect—Limitation Act—Art 83. *Applicability—Indemnity clause—Breach of Damages—Suit for—Limitation—Cause of action—Assessment of damages—Principle—Costs of litigation—Recovery of.*

1st defendant, who along with the 2nd defendant and one N. formed a joint Hindu family, sold his share in the family property to a person who instituted a suit against all of them for the recovery of the share purchased by him. The matters in dispute in that suit were referred to an arbitration and an award was given in 1900 which, besides directing that the purchaser was to be put in possession of the share of the 1st defendant, provided that the second defendant was himself to bear all the debts alleged to have been incurred by him for family purposes and that the other defendants were to have nothing to do with those debts. A decree was passed upon the award in regard to the purchaser's claim, the rest of the award being simply recorded. The purchaser obtained possession of the share decreed to him and sold it to plaintiff in 1901, who, in his turn, sold it to one V. in 1902. Meanwhile in 1901, one K. instituted a suit upon a mortgage bond alleged to have been executed in his favour by the 2nd defendant for a family debt, obtained a decree, and purchased the mortgaged property in execution. Subsequently, he instituted against the 2nd defendant and V. a suit for the delivery of the one-third share of his mortgagor D. obtained a decree in 1909, and obtained possession in April 1911 from V. Thereupon V sued the plaintiff for damages for breach of covenant, obtained a decree, and recovered damages from plaintiff in 1915. In a suit brought in 1916 by plaintiff against, *inter alia*, the 2nd defendant for damages for breach of the obligation imposed upon him by the award and for damages caused to the plaintiff by being obliged to compensate V,

Held.- (1) there was a cause of action to the plaintiff against the 2nd defendant ;

(2) the covenant in the award by the 2nd defendant was in the nature of an indemnity clause, the plaintiff became entitled to sue for reparation only in 1915 when he actually suffered damages, and the suit brought within 3 years from that date was not barred under Art 83 of the Limitation Act,

(3) the plaintiff was entitled to recover by way of damages not only the amount of debt and the interest thereon which the 2nd defendant had undertaken to pay but also the costs of the suit brought by V against himself,

The award was binding on the parties to the reference as if it were a decree of court ; the second defendant had submitted himself to the covenant therein referred to above ; and that covenant enured to the benefit not only of the 1st defendant but of all persons claiming under him,

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* S. A. No. 221 of 1919. 31st October, 1919.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry in A. S. No. 119 of 1917 preferred against the decree of the Court of the District Munsif of Amalapuram in O. S. No. 171 of 1916.

P. Somasundaram, for Appellant.

P. Narayanamurthi and *K. Ramamurthi*, for Respondent.

The Court delivered the following

Judgment :—The facts are somewhat complicated and therefore we must state them before dealing with the questions of law arising in the case. Defendants 1 and 2 and one Krishnamma were members of an undivided family. Krishnamma died leaving a son Narainaswamy. The first defendant sold his share in the family property to the plaintiff by Exhibit A in 1898. The plaintiff conveyed that share to one Subbarayudu by Exhibit B in 1899. Subbarayudu brought a suit to recover the one-third share belonging to the first defendant. To that suit defendants 1 and 2 and Narainaswamy were made parties. The second defendant in that suit pleaded that as there were family debts without apportioning the debts the share of one of the brothers purchased from the first defendant should not be partitioned. There were other pleas also raised by him. In these circumstances the parties agreed to refer their disputes to arbitration during the pendency of the suit. To this reference the first and second defendants and Narianaswamy were all parties. An award was given by the arbitrators Exhibit E. 1 in 1900. Thereupon a decree E. 2 was passed in the suit. Naturally the decree only related to that portion of the claim which Subbarayddu wanted to enforce. The portion of the award which dealt with the rights of the members of the family *inter se* was not embodied in the decree but was simply recorded. One of the terms of the award which is the clause we have to consider is in these terms : "that the second defendant do himself bear all the debts alleged to have been incurred by him for family purposes ; that the debts incurred by defendants 1 and 3 be borne by themselves that the second defendant himself do bear the debts he had agreed to pay the debts which he undertook in writing, and the debts referred to by him in his statement and lists A. B. C. and D filed by him and defendants 1 and 3 shall have nothing to do with them." That is in para 10. Another portion of the award which must

Seetamma v. Narayanamurthi.

be referred to is in para 14 and it is in these terms "The share of the first defendant must be put in possession of the plaintiff in the place of the first defendant," and this award was given in 1900. Subbarayudu subsequent to this award and decree after obtaining possession of his one-third share re-conveyed the property to the plaintiff by Exhibit F. That was in the year 1901.

In 1901 one K. Venkata Reddy alleging that there was a mortgage debt due to him from the second defendant who had contracted the debt on behalf of the family brought a suit O. S. No. 481 of 1901. To that suit the mortgagor, 2nd defendant was a party. A decree was obtained and in pursuance of that decree Venkata Reddy purchased the property and became the owner. Meanwhile the plaintiff had recourse to another of the transactions with which this case has been complicated, namely he sold the property to one Veeraswami in 1902. After the purchase by Venkata Reddy of the property mortgaged he brought a suit for the delivery of the one-third share of the mortgagor, the second defendant. This was in 1905. To this suit Veeraswami the purchaser from the plaintiff was a party. Venkata Reddy obtained a decree in 1902 and obtained possession in April 1911 and in consequence of that decree Veeraswami was deprived of possession and thereupon Veeraswami brought a suit against the plaintiff for damages for breach of covenant and he obtained a decree in 1915. Plaintiff had to pay Rs. 838 and odd in satisfaction of the decree. The present suit was instituted by the plaintiff against the second defendant in 1916 for damages for breach of the obligation imposed on the second defendant by the award and for damages which have been caused to him by being obliged to compensate Veeraswami. Two questions arise for decision under these circumstances. The first is, is there a cause of action to the plaintiff against the second defendant? The second is, is the suit against the second defendant barred by limitation? The first Court dismissed the suit holding that the suit was barred by limitation and that there was no cause of action to the plaintiff against the second defendant. The Subordinate Judge reversed that decree and decreed the plaintiff's claim. This second appeal is against the decision of the Subordinate Judge.

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murthi.

Mr. Somasundaram in a very elaborate argument contended that the plaintiff had no cause of action against the second defendant. His contention is that the covenant if there is one, in Exhibit E. 1, the award, is a personal one, that the first defendant alone is entitled to take advantage of it, that it would not pass to an assignee of the first defendant and that consequently there is no privity of contract between the plaintiff and the second defendant. He relies on *Ittipanku Menon* v. *Dharman Achan* [1] in which a majority of the Judges of this Court have held following *Tweeddle* v. *Atkinson* [2] that the mere fact that a benefit accrued is not a ground for giving a third party a right of suit on a contract to which he was no party. There is no doubt that the principle is well recognised that a mere benefit secured by a document would not give the party to whom the benefit is given a cause of action against a person who is placed under an obligation. Vide also *Raghubans Rai* v. *Jaig Raj* [3] and *Gopala Aiyar* v. *Ramaswami Sastrigal* [4]. But in the present case it is not a case of mere benefit being secured to the plaintiff as against the second defendant. The second defendant expressly pleaded in the suit that without apportioning the family debts to the various members of the family a decree for the share of the first defendant should not be given to the plaintiff. It was in these circumstances that the matter was referred to the decision of arbitrators. It was not denied by Mr. Somasundaram that if there was a suit for partition to which, the alienees were made parties and if under the decree in that suit the equities between the alienees and the members of the family were adjusted by embodying a covenant of this kind the alienees would be entitled to bring a suit for the breach of it. We fail to see why because a portion of the award could not be embodied in the decree of the Court for the reason that the subject-matter of the suit was not dealt with in that portion there should be any difference in principle. The award of the arbitrator is as binding on the parties to the reference as if it were a decree of Court. No doubt, if it becomes a decree of Court it could be executed. Barring that, an award is binding on the parties as if there has been a decree of Court. In these circumstances we are of opinion that there was a covenant in this case to which the second defendant has submitted himself and that covenant enured to the benefit not only to the first defendant but to all persons claiming under the first defendant. The plantiff in terms was given the share of the first defendant by the award. For these reasons we are of opinion that there was a cause of action to the plantiff against the second defendant.

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[1] (1890) I. L. R. 14 Mad. 488.

[2] 124 R. R. 610.

[3] (1911) I. L. R. 34 All. 429.

[4] (1911) 22 M. L. J. 207.

The second question is whether the suit is barred by limitation. The learned Vakil for the appellants mainly relied upon *Dorasinga Thevar* v. *Arunachellam Chetty* [1] and the decisions following it, and argued that if there was an obligation under the award it was broken as soon as it was made or within a reasonable time after the promise and that the suit ought to have been brought within three years of the promise or three years after the lapse of a reasonable time from the date of the award. As was pointed out already this class of cases stands upon a peculiar footing. They must be understood as if there was the relationship of principal and agent between the contracting parties and it must be taken that it was held in the decisions referred to that where an agent does not carry out the terms of the contract the principal is entitled to recover the money. Therefore if without waiting to see whether he was damnified the principal brings a suit, such a suit should not be regarded as premature. This is the ratio decided in *Dorasinga Thevar* v. *Arunachella Chetti* [1]. The same observation applies to *Raghunatha Chariar* v. *Satagopa Chariar* [2] and *Gopala Aiyar* v. *Ramaswami Sastrial* [3]. The question for our consideration in this case is what is the nature of the undertaking which the second defendant entered into under this award—is it purely a personal undertaking or a covenant in the language of Sadasiva Aiyar, J., in *Bhavani* alias *Rukmani Amma* v. *Ananta Kamthi* [4] undertaking to do an act absolutely within a particular period. In the latter case it was held that if the absolute obligation was not fulfilled there would be a cause of action immediately and a suit should be brought within three years. But in our opinion the undertaking given in this case is not an undertaking to do an act absolutely and within a particular time. Therefore *Dorasinga Thevar* v. *Arunachallam Chetti* [1] and *Gopala Aiyar* v. *Ramaswami Sastrigal* [2] have no direct bearing upon the case.

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[1] (1899) I. L. R. 23 Mad. 441.

[2] (1911) I. L. R. 36 Mad. 848.

[3] (1911) 22 M. L. J. 207.

[4] (1916) 31 M. L. J. 556.

Then it was argued by citation of English authorities that the moment there was a breach of the covenant the liability to pay compensation arose and that the plaintiff was not entitled to wait until he was damnified. In the first place the English cases refer to two classes of covenants one covenant which is in the nature of a contract for the breach of which there would be a cause of action at once; the second which is in the nature of a stipulation for quiet enjoyment in which case the cause of action would arise not at the moment when the covenant is entered into but only when the breach of the stipulation occurs. *Battley* v. *Faulkner* [3], *Howell* v. *Young* [4], *Smith* v. *Fox* [5] and *East India Company* v. *Oditchurn Paul* [6] are all cases belonging to this class. But the present covenant does not come under either of the above two categories. It is really in the nature of an indemnity clause; and as was pointed out in *Venkataramayya* v. *Lanka Ramabrahmam* [7] the cases of indemnity differ materially from cases of covenants; in the former case it is only when the parties are damnified or when damage is sustained a cause of action arises. It was also pointed out in that case following *Jacob* v. *Down* [8] that a mere breach of one of the terms in the indemnity clause does not start the cause of action at once but that is open to the party to waive the right and to wait until he is damnified. In the present case the covenant was entered into to relieve the first defendant and his assignees from all liability for debts contracted on behalf of the family. It is only when a suit was brought by the creditor to enforce an obligation which is binding on the family that the cause of action can be said to have arisen. Regarding the clause in question as an indemnity clause it is only when the plaintiff

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[1] (1899) I. L. R. 23 Mad. 441.

[2] (1911) 22 M. L. J. 207.

[3] (1820) 3 B. & Ald. 288 (106 E.R. 669).

[4] (1826) B. & C. 259 (108 E. R 97).

[5] (1848) 6 Hare.

[6] (1849) 7 M. P. C. 85.

[7] (1918) 35 M. L. J. 124.

[8] (1900) 2 Ch. 156.

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actually suffered damages he became entitled to sue for reparation. It was not therefore until Veeraswami brought a suit to recover damages and the plaintiff was compelled to meet that decree that he was damnified. That was in 1915 and the suit was brought within three years from that date. The article applicable to this case is article 83 and the suit having been brought within three years of the damages it is within time.

Mr. Somasundaram raises lastly the question of quantum of damages and contends that what was awarded by the lower court was excessive. His argument is as the second defendant's undertaking was to pay the debts he was only bound to pay the amount of debt and interest thereon. But as Mr. Narayanamurthi points out under S. 124 of the Contract Act the costs which a man incurs in meeting a litigation are a portion of the damages which he is entitled to recover from the party who is bound to indemnify him. Therefore the amount of damages awarded is not excessive in this case.

For all these reasons we agree with the lower Appellate Court and dismiss this second appeal with costs.

A. S. V.

PRIVY COUNCIL.

[PRESENT:—LORD SHAW, LORD PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS].

[On Appeal from the High Court of Judicature at Madras].

M. R. Seturatnam Aiyar and others ... *Appellants.**

v.

Venkatachala Gounden and others ... *Respondents.*

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Seturatnam Aiyar v. Venkatachala Goundan.

Landlord and tenant—Ryotwari tenure—Occupancy rights—Burden of proof when existence of such rights is questioned—Jurisdiction of second Appellate Court to find facts—Code of Civil Procedure (Act V of 1908) S. 103.

Under the system of ryotwari tenure prevalent in Madras, there is no presumption that under-ryots have the right of permanent occupancy: and if they assert such a right, the burden of proof is on them, such burden may be discharged by proving a custom, a contract, or a title, and possibly by other means. In the present case it was held to be established by the evidence as a matter of title, *viz.*, that the under-ryots had had occupancy rights from the very first.

In this case the High Court in second appeal fixed fresh issues of fact, and referred them for trial to the Court of first appeal. That Court failed to grasp the true meaning of the issues framed, and again dealt with the question in an incomplete manner. The High Court thereupon decided the issues themselves.

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* P. C. Appeal 157 of 1917. 18th, 20th and 28th November 1919.

Held, that under S. 103 of the Code of Civil Procedure, 1908, the High Court had power to deal with the question involved even though one of fact.

Consolidated appeals from three decrees of the Madras High Court, modifying in second appeal three decrees passed by the District Court of Trichinopoly on appeal from the District Munsiff of Kulitalai.

[See 24 M. L. J. 571 for a full report of the High Court Proceedings].

The facts of the case will sufficiently appear from their Lordships' judgment of the Madras High Court (Benson and Sundara Aiyar, JJ.,) which commenced as follows:—

"In these cases the suits were instituted by a Mirasdar of Karapathur in the district of Trichinopoly to eject a large number of ryots who were in occupation of different plots of land for which the plaintiff held patta under the Government. The lands in question are part of the samudayam lands in the village, that is, lands held in common by the mirasdars without being divided into individual holdings. The samudayam was divided into 50 *pangus* or shares, of which the plaintiff was the owner of 14½ shares. In 1897 the plaintiff instituted a suit against his co-sharers for partition of the samudayam lands, and obtained a decree therefor. The plaintiff alleged in his plaint that the lands now sought to be recovered from the defendants were allotted to him at the partition made by Court between himself and his co-sharer-mirasdars and that he was resisted in his attempt to take actual possession by the defendants, the cultivating ryots. He gave notice to them to terminate their tenancy and instituted these suits to recover the lands with arrears of rent and mesne profits.

"Several of the defendants agreed to surrender the lands in their possession and others did not appear to oppose the suit. The contesting defendants besides raising certain technical objections to the maintainability of the suits pleaded that they were entitled to a permanent right of occupancy in their holdings, that they had made large improvements by constructing wells and raising buildings on the lands and that, if they were ejected, they were entitled to compensation for those improvements to the extent of Rs. 1,50,000."

"The principal question in the cases related to the contention that the defendants had occupancy rights in their holdings. The lands in question consist of three classes, garden, dry and pasture lands. It is admitted that all the lands were originally waste and that the dry and garden lands were brought under cultivation subsequently by the ryots. The District Munsiff held

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that, as the plaintiff was the pattadar, the onus was on the defendants to prove that they at some time acquired occupancy right in the lands from the plaintiff or his predecessors, and that they had not succeeded in showing how they acquired such right. He, however, held that with regard to the garden lands the plaintiff was equitably estopped from ejecting the defendants as they had to the knowledge of the plaintiff and his predecessors-in-title and his co-sharers constructed wells and had been in the habit of alienating them to the knowledge of the pattadars. He passed a decree for the ejectment of the defendants from the dry lands and the pasture lands in their possession and dismissed the suit with regard to the garden lands. On appeal, the District Judge was of opinion that the rule of equitable estoppel was not applicable to the case and that plaintiff was entitled to eject the defendants from the garden lands also, but that they were entitled to compensation for improvements, if they had made any, and requested the District Munsiff to submit a finding on the question, which of the defendants were entitled to compensation for any and what improvements. When the District Munsiff returned his finding, the District Judge refused to accept it and held that the defendants had failed to give evidence that they were entitled to any compensation and passed an unconditional decree for ejectment from all the lands in the defendants' possession. When these second appeals first came on for hearing, this Court considered it necessary to remand the case for fresh findings on the following issues :—

"(1) Whether the appellants in these appeals are tenants from year to year or whether have a permanent right of occupancy in the lands in dispute ?

(2) Whether the plantiff is estopped from denying that the appellants in these appeals have a permanent right of occupancy ?

(3) What compensation, if any each of the appellants in these appeals is entitled to for effecting improvements on the land by digging wells and ponds ?

(4) What is the nature and value of any buildings constructed by each of the appellants in these appeals ?

(5) What mesne profits will each of the appellants in these appeals be liable for in case of ejectment ?

"The Court pointed out in the order of remand that the Judge was wrong in starting with the assumption that ryots holding under a pattadar must be held to have been originally tenants from year to year, and that they are bound to show that their right was subsequently converted in some way or other into a permanent right, and that there

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was a great deal of evidence adduced both by the plaintiff and the defendants which would enable the Court to give a decision on the question of the defendants' occupancy right irrespective of the onus of proof in such a suit. The District Judge in his order submitting his findings has, notwithstanding the caution given by this Court, again assumed that the defendants' original right was that of tenants from year to year and that it lay on them to prove an express or implied contract by which the right of tenancy from year to year was changed into a right of permanent occupancy. He considered himself justified in doing so by certain observations of Shephard and Subramania Aiyar, J. J., in *Cheekati Zemindar* v. *Ranasooru Dhora* [1] and he pointed out that, while in Second Appeals Nos. 1471 and 1472 of 1909 this Court observed that the Court is not in all cases bound to presume that a tenancy under a Government pattadar is one from year to year and to throw the onus disproving it on the tenant, it abstained to from expressing any opinion on the question of onus in this case in the order of remand. The Judge found that the defendants did not succeed in proving that their orginal tenancy was converted into a permanent occupancy with regard to the dry and pasture lands and some of the garden lands: but that in the case of other garden lands, having regard to the value of the improvements made by the ryots, the landlord must be taken to have impliedly contracted to give a permanent occupancy right. In the cases of ryots whose improvements exceeded the original value of the land, he raised this implication of a contract. But he refused to do so where the improvements were of less value than the land itself. We are of opinion that this criterion is absolutely indefensible."

The learned Judges then reviewed the findings of fact bearing on the question of occupancy right which had been arrived at by the Judge and the facts admitted by the parties, and observed.

"We take it as established (1) that the ryots of the village have been immemorially in possession of the lands and that they have not been proved to have been ever let into occupation by the mirasdars; (2) that they have been paying a uniform rate of rent; (3) that the lands were reclaimed and brought under cultivation by them; (4) that they have made large improvements and carried on the cultivation either of dry or garden crops of their own choice without any interference or objection by the mirasdars; (5) that they have for a very long time been making alienations, sometimes of wells, sometimes of both wells and lands and sometimes of the right of cultivating the lands along with the wells alienated.

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[1] (1899) I. L. R. 23 Mad. 318.

They then considered whether on these facts the plaintiff was entitled to eject the defendants on the mere ground that he was the pattadar of the lands, and after a lengthy review of the varying local conditions in different parts of Madras and pointing out that these negatived the existence of any uniform rule, they concluded :

"In the present case there is hardly a single circumstance in the plaintiff's favour except the bare fact that he is the pattadar of the land. We see no reason to depart from the ruling in *Veerana Ambalam Periya Karuppan Ambalam* v. *Annasami Ayyar* [1], that this by itself is not sufficient to entitle the appellants to a presumption that the defendants either originally came in as tenants from year to year under the mirasdar or subsequently agreed to hold as such. The plaintiff has made no attempt to prove that the customary mode of land-holding in the particular tract of country where the village is situated would justify such a presumption. On the other hand, there can be no doubt that purakudies with occupancy rights were by no means uncommon in the district where the lands in question are situated. There is no reason why the ordinary rule that a person who wants to eject another from land of which he is in possession must prove that the occupant came into possession as his tenant under a contract which entitles him to eject. See *Venkatacharlu* v. *Kandappa* [2]. The fact that the defendants brought the lands in the village under cultivation and spent their own money in making improvements without any help from the mirasdars is of the greatest possible weight against the respondent."

After dealing with various arguments based on the aleination in some cases of the wells alone and in others of the right to cultivate, in contradistinction to the land, and pointing out that in other cases the land itself was transferred, they concluded as follows :—

"We have in this case all the characteristics of a permanent right of occupancy in the defendants and hardly a single instance in favour of the plaintiff's right to eject. We hold that the mere fact of the plaintiff being the pattadar does not entitle him to any presumption in his favour and we also hold that, even if that fact could be of any use to him, the various circumstances proved unrebutted by anything in the plaintiff's favour necessarily raise a presumption that the defendants have occupancy rights. We do not think any distinction can be drawn between the garden lands and the dry lands in the defendant's occupation. In the case of both, the reclamation of waste was made by the ryots and they have held the land

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1. (1911) 21 M. L. J. 845.

2. (1891) I. L. R. 15 Mad. 95.

always at a uniform rate of rent. The absence of any alienation with regard to the dry lands cannot be regarded as a circumstance against them, as it is admitted that the lands are of a poor quality and would probably therefore not attract purchasers. The question of pasture lands remains to be considered. They have not been brought under cultivation by the defendants. The plaintiff as pattadar is entitled to bring waste lands included in his pattah under the plough. It does not appear that the defendants have exercised any right of enjoyment over them which would justify us in holding that they have occupancy rights in them."

We are therefore of opinion that the decree for ejectment must be confirmed with regard to the pasture lands. The claim for rent has been settled by agreement between the parties. We modify the decrees of the Courts below by giving the plaintiff a decree for the pasture lands only specified in the finding of the District Judge and dismiss the suit with respect to the dry and garden lands. The decrees in so far as they relate to the rent will stand so far as the appellants are concerned. Both sides will have proportionate cost throughout."

On this appeal.

De Gruyther, *K. C.* and *Kenworthy Brown*, for appellants, submitted that the defendants respondents had no right of permanent occupancy in the lands. If they had such rights, it must be either by the Permanent Settlement or by contract. The lands here were divided into three classes (1) dry land (2) garden (3) pasture. As to the third there is now no dispute. The High Court has decided in our favour and there is no appeal. As to the other two classes we do not object to pay compensation for improvements; but we contend we are entitled to ejectment. The High Court ought not to have remanded the case. In a second appeal the District Judge's findings of fact are final. The High Court practically say that there is a presumption in favour of occupancy rights, arising from long occupation and payment of a uniform rent. We say the burden of proof was on the cultivators and they failed to discharge it: The District Judge found as a fact that there was no occupancy right.

[*Sir Lawrence Jenkins* referred to S. 103 of the Code of Civil Procedure].

That section does not apply :—The Lower Appellate Court had determined the issue. Its finding of facts is final : *Mt. Durga Chowdhrain* v. *Jawahir Singh Chowdhri* [1].

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[1] (1890) L. R. 17 I. A. 122.

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There is no question here of expectation or encouragement: If the tenant makes a well without leave he does it at his own risk: but here the cultivators applied for licenses, which the landlord gave. If he ejects them he must compensate but no question of estoppel as to permanent occupancy arises.

[*Lord Phillimore*: Your case is that though they may have held for a great many years, it is a mere matter of contract and they have no right to continue].

The matter has been confused by a mass of authorities which have little bearing: the crucial question is to determine what were the rights of the parties when the Permanent Settlement was made in 1812. Custom is not alleged. If these peoples' predecessors had occupancy rights in 1802, *cadit quaestio*: if not, we took the land then free of occupancy right: it was we who had the occupancy right —the Kudivaram. Now have they acquired the rights since? we say not.

[*Sir John Edge.*—You say that continuous occupation since 1803 raises no presumption ?]

If all you have to go on is a uniform rent and long holding, those are elements to be considered. If you know nothing about the origin of the tenancy, you must deal with it on such materials as you have: but here you do know the origin. All that is established here is that some, not all, of these holdings have been held by the present tenants for a very long time. Uniformity of rent is not so clear: it is merely a uniform rate for the quality of the land: the rate changed if the land were converted. The plaintiff's predecessors here were the "ryots or cultivators" mentioned in the Fifth Report of 1812 (Madras Presidency) p. 61: being Brahmins they could not and did not cultivate themselves, but they had the tenant right. Reference was made to the following: *Secretary of State* v. *Luchmeshar Singh* [1], *Seena Peena Reena* v. *Chockalingam Pillay* [2], *Chidambara Pillai* v. *Thiruvengadathiengar* [3], *Rangasami Reddi* v. *Gnana Sammantha* [4], *Cheekati Zemindar* v. *Ranesoora Dhora* [5], *Seshamma Shettali* v. *Chikaya Hegade* [6], *Muna Muhammad Rowther* v. *Muthu Alagappa Chettiar* [7]. *Ponniah Nadan* v. *Deivanai Ammal* [8]. *Fifth Report (Madras Presidency).* pp. 178, 479—461, 615, 790, 798, 808.

The ruling in *Veerana Ambalam Periakaruppan Ambalam* v. *Annasami Aiyar*, [9] is merely that the mere fact of the landlord being

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[1] (1888) L. R. 16 I. A. 6.

[2] (1904) L. R. 31 I. A. 83.

[3] (1887) 7 M. L. J. 1.

[4] (1898) I. L. R. 22 Mad. 264.

[5] (1899) I. L. R. 23 M. 318.

[6] (1902) I. L. R. 25 M. 507.

[7] (1918) 34 Mad. L. J. 234.

[8] (1918) 36 Mad. L. J. 463.

[9] (1911) 21 Mad. L.J. 845.

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pattadar is not conclusive; that case does not decide that there is any presumption against him. The tenants here have no right, except to compensation.

E. B. Raikes and Palat, for Respondents: The District Judge here took an altogether erroneous view of the law applicable to the case. There was evidence on which he could have come to a finding on the issues framed by the High Court, but he failed to do so and under S. 103 the High Court had jurisdiction to determine the issue itself. The burden of proof was on the plaintiff: he alleged he had right to eject, and must prove it. The mere fact that he is pattadar does not shift the burden. The Fifth Report shows that the mirasidar always had the first right to the issue of patta, whether there were occupancy rights or not. In *Secretary of State* v. *Lachmeshar Singh*.[1] the circumstances under which Government who were in that case the tenants, came into possession were known; that is not so here. The decision in *Seena Peena Reena* v. *Chockalingam Pillay* [2] turned upon the terms of the contract in that case. The High Court have rightly inferred from the facts in this case that the cultivators have permanent rights: there is nothing in any of their own previous decisions which conflicts with that view, and it is supported by *Veerana Ambalam's* case, [3] *Muna Mahomed Rowther* v. *Muthu Alagappa Chettiar* [4] *Krishnasami Pillai* v. *Varadaraja Ayyangar* [5]. Reference was also made to, Trichinopoly Manual, p. 178. Fifth Report (Madras) pp. 104-106, 489, 615, 622, 625, 750-1, 785. *Suryanarayana* v. *Potana* [6], *Afzal-un-nisa* v. *Abdul Karim* [7].

De Gruyther, K.C., in reply :—If there had been any independant tenant with occupancy rights at the time of the Permanent Settlement. the Fifth Report shows that the settlement would have been made with him direct. There were wet lands included in the original patta, but it is not suggested that the cultivators of these lands had occupancy rights. The only right which the tenants here have is to be compensated for the wells made in the garden (or wet) lands.

Their Lordships judgment was delivered (15th Dec. '19) by.

Sir Lawrence Jenkins.

Sir Lawrence Jenkins.—These consolidated appeals are from three decrees of the High Court at Madras dated the 18th

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1. (1888) L. R. 16 I. A. 6.
2. (1904) L. R. 31 I. A. 83.
3. (1911) 21 M. L. J. 845.
4. (1918) 34 Mad. L. J. 234.
5. (1882) I.L.R. 5 Mad. 345 at pp. 355, 356.
6. (1918) L. R. 45 I. A. 209.=36 M. L. J. 585.
7. (1919) L. R. 46 I. A. 131.=36 M. L. J. 580.

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February, 1917. The decrees had modified three appellate decrees of the District Court of Trichinopoly which in turn had modified three original decrees of the Court of the District Munsiff of Kulitalai.

The three suits thus came before the High Court in second appeal, so that the Court had no jurisdiction to interfere with any finding of fact by the District Court; its only power to determine issues of fact was that created by S. 103 of the Code of Civil Procedure, 1908.

Each of the suits is for the recovery of possession of agricultural land in a ryotwary tract, and has been instituted by the plaintiff as the Government Pattadar.

The number of the defendants in the several suits is 165, 103 and 30. They are not, however, in joint possession; on the contrary, they have separate holdings and should have been separately sued.

The plaintiff's title is conceded, and he alleges that the defendants are tenants under him and that their several tenancies have been determined by notice. The defendants plead in answer to his claim for possession (1) that they severally have a permanent tenancy or right of occupancy, and (2) that they are protected from ejectment by the doctrine of estoppel.

The land in suit is of three classes, garden, dry, and pasture. In the Court of the Munsiff it was held that the plaintiff's claim to recover the garden land was barred by the plea of estoppel, but that his claim to the rest must succeed as no right of permanent tenancy was established.

From this decision cross-appeals were preferred. At the first hearing of the appeals the District Judge disallowed the plea of estoppel, and also held that the defendants had not established their right to a permanent occupancy. It is important to observe how he dealt with this last aspect of the case:—

> "The question for consideration in this case," he said, "is whether the defendants have shown that the plaintiff or his predecessor-in-title had contracted the right of tenancy (which) should be changed into a right of permanent occupancy."

His finding on this was as follows:—

> "In these circumstances it is, I think, clear that the defendants have not established any contract on the part of the plaintiff or his predecessor-in-title to convey to them a right of permanent occupancy."

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Ultimately he passed decrees in the plaintiff's favour for possession of all the suit lands. The defendants appealed to the High Court, and the learned Judges expressed the view that the mode in which the District Judge had dealt with the question of a permanent tenancy was not satisfactory. And after quoting the proposition as formulated by him they observe that: —

> " The real point for determination before the learned Judge was whether on the admitted and undoubted facts of the cases and the evidence of both sides the defendants held the lands in their possession as tenants from year to year or as persons having a right of permanent occupancy."

The distinction between the two propositions is manifest. In the result the learned Judges asked the District Judge to return revised findings on the following questions:—

> " 1. Whether the appellants in these appeals are tenants from year to year, or whether they have a permanent right of occupancy in the lands in dispute ?
>
> " 2. Whether the plaintiff is estopped from denying that the appellants in these appeals have a permanent right of occupancy ?
>
> " 3. What compensation, if any, the appellants in these appeals are entitled to for effecting improvements on the land by digging wells and ponds ?"

It has been contended that the Court acted without jurisdiction. But this proceeds on a misapprehension of what the High Court did. It did not remand under Rule 23 of Order 41 of the Code of Civil Procedure but merely framed issues and referred them for trial to the District Court as provided in Rule reason.

In the opinion of the learned Judges of the High Court the District Judge had omitted to determine a question of fact which appeared to them essential to the right decision of the suit on the merits ; he had failed to consider whether, apart from the particular contract to which his attention was exclusively directed, there was evidence on which to hold that from their inception the holdings of the defendants were permanent or in the nature of occupancy rights.

It is perhaps to be regretted that the learned Judges of the High Court did not give a fuller and clearer explanation of the reasons which influenced them, for the result was that the District Judge failed to grasp the true meaning of the issues framed by the High Court, and again dealt with the question in the same incomplete manner.

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He treated the long duration of the tenancy and the uniform and unvarying rate of the rent as a circumstance by itself not sufficient "to raise a presumption of an implied contract that the right of tenancy should be changed into a right of permanent occupancy."

The District Court's findings were returned to the High Court, and the learned Judges pointed out that the District Judge in his order submitting his findings had, notwithstanding the caution given by the High Court again assumed that the defendants' original right was that of tenants from year to year and that it lay on them to prove an express or implied contract by which the right of tenancy from year to year was changed into a right of permanent occupancy.

Instead of a further reference the High Court proceeded to determine this issue and, if and so far as this was an issue of fact—a point on which it is not necessary to express a definite opinion in the circumstances of this case—the Court had power to deal with it under S. 103 of the Civil Procedure Code, 1908.

The conclusion at which the High Court arrived was that the defendant had occupancy rights.

This finding, however, is attacked on the ground, first, that the burden of proof was wrongly thrown on the plaintiff, and secondly that in any case the facts did not justify the inference.

To determine on whom the burden of proof lay it is necessary to ascertain with precision upon what propositions of fact or of law the parties were at variance, and how matters stood when the cases reached the High Court.

The plaintiff's title was conceded, and the notice by which he purported to terminate the defendants' tenancy was not disputed. It was also admitted that the defendants held under, if not from, the plaintiff. To resist the plaintiff's claim the defendants set up a permanent tenancy or an occupancy right in themselves. If this was not established then the defendants must fail, and, to adopt the language of S. 101 of the Evidence Act, as the defendants were bound to prove the existence of their permanent tenancy or occupancy right the burden of proof as to it lay on them. This view as to the incidence of the burden has been repeatedly recognised in the series of Madras decisions cited in argument and is, in their Lordships' opinion, not open to doubt.

There are passages in the High Court's final judgment which unquestionably invite the comment that the learned Judges misapprehended the proper incidence of the burden of proof. Thus the learned Judges say :—

> "We hold that the mere fact of the plaintiff being pattadar does not entitle him to any presumption in his favour."

This proposition is open to the construction that the burden lay on the plaintiff not only to establish his title but also to negative the defendants' claim to permanency, and if this is what was meant it was wrong. But the sentence that immediately follows shows a truer perception of the position. The learned Judges there say :—

> "We also hold that even if that fact could be of any use to him the various circumstances proved, unrebutted by anything in the plaintiff's favour, necessarily raise a presumption that the defendants have occupancy rights."

The controversy had passed the stage at which discussion as to the burden of proof was pertinent; the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them.

In the end the learned Judges drew the inference—they speak of it as a presumption—in favour of the defendant's occupancy rights, and as finally expressed their determination was unvitiated by any error as to the burden of proof.

Nor is their inference contradictory of any finding of fact by the District Court; on the contrary, it rests on the findings of that Court, and in the shape it took in the High Court it certainly had not been negatived by the District Court.

A word of explanation will make this evident. Permanence is not a universal and integral incident of an under-ryot's holding; if claimed, it must be established. This may be done by proving a custom, a contract, or a title, and possibly by other means. Custom is out of the question here; there is no suggestion of it. Contract has been decisively negatived by the finding of the District Court. Title was left untouched, and it was on title that the High Court pronounced in the

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defendants' favour; for the meaning of their finding is not that there was a subsequent change in the relations of the parties, but that at the inception of those relations the defendant's predecessors possessed occupancy rights.

Conflict with any finding of the District Court being eliminated, it next has to be seen whether there were materials on which the High Court could come to its conclusion. They are minutely indicated in the judgment under appeal, and, in the absence of all information as to the origin of the defendants' holdings, it cannot be said that there is no evidence to support the High Court's finding. It may be that regarded even as a finding of fact—and it has been so treated throughout—it is not conclusive, though curiously enough it would have had that character had it been pronounced by the District Judge and not by two Judges of the High Court. But after due consideration of the evidence brought to their notice and of all the circumstances, their Lordships see no sufficient reason to interfere with the High Court's conclusion; nor is it in their opinion to be regretted that effect has been given to the very long possession—"immemorial" in the High Court's view—of the defendants and their predecessors.

It has been objected by the appellant that much of the evidence that has been used against him is not relevant, as the long possession, the alienations and the improvements to which it relates have not been traced to the several defendants or their predecessors-in-title. But the plaintiff, in disregard of the provisions of the Code, has united in the same suit not merely several causes of action, but several actions or suits against separate defendants, with the result that in effect the litigation has been conducted and treated throughout as though the defendants were a community with common interests. The plaintiff therefore cannot now be heard to object to the use of evidence to which the irregularity of his procedure has given relevance and to which he apparently took no exception when it was tendered at the trial.

The objection might have been formidable had the plaintiff sued the several defendants in separate suits, and their Lordships recognise that in view of the exceptional and

P. C.

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irregular character of this litigation this case cannot in this respect be a satisfactory precedent in a properly constituted suit. As it is, however, the objection must fail and the High Court's finding as to the permanence of the defendant's rights in the garden and dry lands must stand.

Following on this finding the High Court, while confirming the decree for possession of the pasture land passed by the lower Courts, ordered that the plaintiff's suits, so far as they sought delivery of possession of the garden and dry lands, be dismissed.

The plaintiff alone has appealed from the High Court's decree, and the present appeals are limited to the garden and dry lands. For the reasons already indicated they must fail.

Their Lordships therefore will humbly advise His Majesty that the appeals should be dismissed. The appellants must pay the costs of the appeals.

Solicitor for appellants—*Douglas Grant.*

Solicitors for respondents—*T. L. Wilson & Co.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SESHAGIRI AIYAR.

Jaimullabdin ... *Petitioner,* * (*Accused.*)

In re.

Jaimullabdin *In re.*

Evidence Act, S. 114 (a)—Applicability—Presumption under Section—Time limit—Accused found to be in possession of alleged stolen article 13 *months after alleged theft—No presumption—Accused not bound to explain possession.*

In a case in which the accused was found to be in possession of alleged stolen articles thirteen months after the alleged theft, *held* that the case was not one for raising the presumption under S. 114 (*a*) of the Evidence Act and for calling upon the accused to explain his possession.

Ina Sheikh v. *Queen Empress* [1]. 11 C. 160 followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Sessions Court of Bellary in Criminal Appeal No. 19 of 1919 preferred against the judgment of the Court of the Sub-Divisional First Class Magistrate of Anantapur in C. C. No. 2 of 1919.

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* Cr. Rev. Case No. 288 of 1919 and Cr. Rev. Petition 23 of 1919. 26th September, 1919.

Dr. S. Swaminathan, for the Petitioner.

V. L. Ethiraj, for the Public Prosecutor on behalf of the Crown.

The Court made the following

Order :—The conviction must be quashed. The Sessions Judge begins his judgment by saying "There is no time limit, however, applicable to the presumption, in S. 114 (a) of the Indian Evidence Act (I of 1872," The section is clear upon the point. It says that "the Court may presume that a man who is in possession of stolen goods" soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession." Certainly 13 months after the theft is not "soon after." Moreover the evidence of P. W. No. 7 shows that he lost the articles some 2 or three years before. Even granting that the evidence of P. W. No. 1 is to be accepted in its entirety that the articles now found out belonged to him, as pointed out in *Ina Sheikh* v. *Queen Empress* [1] this is not a case in which the accused should be called upon to explain his possession. Miller, J., in *The District Magistrate of Bellary* v. *Obbava* [2] took the same view and that has since been approved in Criminal Revision Case No. 320 of 1919. I am in entire accord with the observations in *Ina Sheikh* v. *Queen Empress* [1] and I think the Magistrate was wrong in thinking that the accused was bound to explain his possession of the articles.

I was told that there were other articles found in an open well in the compound of the accused which was accessible to all. It does not follow because certain articles were found in a well which could have been reached by other persons, that the accused should have put them into the well having known them to be stolen property. In my opinion the evidence upon which the conviction is based is wholly insufficient to sustain a conviction. I set aside the conviction and direct the bail bond to be cancelled.

A. V. V.

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1. (1885) I. L. R. 11 Cal. 160.

2. (1912) M. W. N. 529.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:— MR. JUSTICE SESHAGIRI AIYAR AND MR. JUSTICE MOORE.

Varanasi Subbayya and others ... *Appellants**.
v. (*Defendants 1 to 5*)
Varanasi Somalingam and others ... *Respondents.*
(*Plaintiffs and Defendants 6 to 8.*)

Subbayya v. Somalingam.

Co-owners—Building erected by one in violation of other's rights—Remedy of latter—Mandatory injunction—Right to, where no other remedy possible.

Where, in a case in which plaintiffs and defendants were joint owners of a lane, defendants put up two pials and steps on that portion of the lane which adjoined their house thereby encroaching upon the common lane and making it less convenient to plaintiffs, *held* that the plaintiffs were entitled to sue for a mandatory injunction for the removal of the obstructions because no other remedy was possible.

Anandachandra Sen v. *Parbathinath Sen* [1] distinguished.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Masulipatam in Appeal Suit No. 107 of 1918 (A. S. No. 17 of 1918 on the file of the District Court) preferred against the decree of the Court of the District Munsif of Gudivada in Original Suit No. 38 of 1914.

P. Markandeyalu, for Appellant.

T. Ramachandra Rao, for Respondent.

The Court delivered the following

Judgment.—The facts are not in dispute. The plaintiffs and the defendants are joint owners of a lane. The lane is 10 feet in breadth. The defendants, on that portion of it, which adjoins their house have put up two pials and steps thereby encroaching upon the common lane to the extent of one foot in breadth. The plaintiffs brought the suit for a mandatory injunction for the removal of these obstructions. The District Munsiff dismissed the suit on the ground that the lane was a public one and that the plaintiffs have no right of action. The Subordinate Judge has held that the lane is the common private property of the plaintiffs and defendants and has given a decree for demolishing the steps and pials. The learned Vakil for the appellants argues that on these facts the plaintiffs

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* S. A. No. 315 of 1919. 7th November, 1919

[1] (1906) 4 C. L J. 198 (205).

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are not entitled to a mandatory injunction. He strongly relies upon the observations of Mookerjee, J., in *Ananda Chandra Sen* v. *Parbatinath Sen*[1] where the learned Judge points out that in cases where property is owned by two persons in common the mere fact that a building is erected by one of the co-owners in violation of other persons' right would not enable the other owner to bring a suit for demolishing the building so erected. This follows a judgment of the Judicial Committee in *Robert Watson & Co.*, v. *Ramachand Dutt* [2] and a number of English decisions upon the point. In this court it was quoted with approval in *Kalliani Amma* v. *Govinda Menon* [3] where the question was whether a building erected on tarwad property by one of the members should be demolished at the instance of the other members. The learned Judges of this Court point out that there was a distinction between *Anandachandra Sen* v. *Parbathinath Sen* [1] and the case before them inasmuch as the property in the Madras case would be required for the purpose of extending the tarwad buildings for the use of the members of the tarwad. We think that the decision in *Kalliani Amma* v. *Govinda Menon* [3] and that in *G.I. P. Railway Company* v. *Nowroji Pestonji* [4] apply to this case and not *Anandachandra Sen* v. *Parbathinath Sen* [1]. In *G. I. P. Railway Company* v. *Nowroji Pestanji* [4] the suit was for re-opening a gateway over which there was a public right of way it was held that the plaintiff was entitled to sue for the removal of the obstruction. The principle, so far as we are able to see, is that if it is common property and if there are other remedies open to the party who has been affected, by the wrongful act of the co-owner then the courts should not ordinarily grant a mandatory injunction. But in this case no other remedy is possible. Therefore the property should be left in its original condition if there is to be convenient enjoyment as the lane cannot be partitioned. Under these circumstances when one of the joint owners puts an obstruction on the lane which has the effect of making it less convenient for the other co-owner the only remedy open to him is to sue for a mandatory injunction. In our opinion therefore the injunction granted by the lower appellate court is right.

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1. (1906) 4 C. L. J. 205.
2. (1890) 17 I. A. 120.
3. (1911) I. L. R. 35. Mad. 648=22 M. L. J. 23.
4. (1885) I. L. R.10 Bom. 390

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One other point has been raised by the learned Vakil for the appellants and that is that there has been acquiescence on the part of the plaintiffs which debars them from bringing a suit for a mandatory injunction. The District Munsif found that the steps and the pials were recently constructed. In his opinion apparently it was not more than a year old. The Subordinate Judge has expressed no opinion upon the matter because there has been no issue upon the question of acquiescence. Having regard to the finding of the District Munsif we are not prepared to hold that the conduct of the plaintiffs has been such as to deprive them of their right of action by way of injunction. For these reasons we think the decree of the Subordinate Judge is right and dismiss the second appeal with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE SPENCER.

Sriman Madabhushi Gopalacharyulu ... *Appellant** (*10th Defendant.*)

v.

Emmani Subbanna and others ... *Respondents* (*Defendants.*

Madabhushi
Gopala-
charyulu
v.
Emman
Subbanna.

C. P. Code.—S. 11 *Expl. VI*; *Or.* 1 *R.* 8—*Scope and applicability—Kattubadi—Suit between Zemindar and some agraharamdars for settling—Decision in—Effect on other agraharamdars.—Some of them represented at one stage of the suit but not afterwards—Effect.*

Two of the agraharamdars sued the Receiver of the Nidadavole estate and the Zemindar for a declaration that the Kattubadi was only 500, joining the other agraharamdars as defendants. The suit was decreed by the first Court; but its decree was, on appeal by the Receiver, reversed by the District Court; and the decree of the District Court, was, on second appeal by plaintiffs, confirmed by the High Court. Pending the appeal to the District Court. A, one of the agraharamdar defendants died, but her representatives were not brought on the record in that Court nor were they made parties in the Second Appeal. In a subsequent suit between the Zemindar as plaintiff and the agraharamdars as defendants (the 10th defendant being the representative of A), as to the amount of the Kattubadi payable to plaintiff, *held* that, by virtue of Explanation VI of S. 11 of the Code of Civil Procedure, the amount of the Kattubadi was *res judicata* against the 10th defendant by reason of the decree in the Second appeal in the prior suit.

Per *The Chief Justice* :—The Courts should hesitate to hold that any litigation had been *bona fide* within the meaning of Expl. VI of S. 11 in which there had been a substantial departure from the accepted rules as to the joinder of parties as

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* S. A. No. 465 of 1918. 16th December, 1919.

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for instance by suing without the leave of the Court in a case properly falling under O. 1 R. S.

The failure of the plaintiffs in the prior suit to implead the legal representatives of A in the Second appeal could not, in the circumstances of the case, be said to constitute such a want of *bona fides* as to render the Explanation inapplicable.

Scope and applicability of the Explanation considered.

Per *Spencer, J* : A suit instituted for setting the amount of Kattubadi due to the Receiver of an estate upon an agraharam is one in which all the agraharamdars are necessarily interested and the decision therein is, if the litigation is conducted *bona fide*, binding on all the agraharamdars by virtue of Expl. VI of S. 11. Cases in which a party is represented at one stage of the suit and afterwards ceases to be represented owing to a failure to bring his legal representatives on record are not exceptions to the rule laid down by the Explanation.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Ellore in A. S. No. 402 of 1915, preferred against the decree of the Court of the District Munsif of Tanuku in O. S. No. 483 of 1914.

The Hon. Mr. T. R. Ramachandra Aiyar and *T. R. Krishnaswamy Aiyar*, for Appellant.

P. Venkataramana Rao for Respondents.

The Court delivered the following

Wallis, C. J.

Judgments :—*The Chief Justice*.—The subject of this suit is the amount of the kattubadi payable to the plaintiff Zemindar by the defendants who are agraharamdars, and the question argued before us is whether this is *res judicata* against the 10th defendant by reason of the decree in second appeal No. 838 of 1911 confirming the decree in A. S. No. 451 of 1905 which decided the question against the agraharamdars reversing the decree of the Subordinate Judge in their favour.

In O. S. No. 56 of 1901 in the Court of the Additional Subordinate Judge's Court of Rajahmundry two of the agraharamdars sued the Receiver of the Nidadavole Estate and the Zemindar for a declaration that the kattubadi was only 580 joining the other agraharamdars as defendants.

The Additional Subordinate Judge of Godavari gave the plaintiffs a decree in O. S. No. 56 of 1901 which was reversed on 1st December 1910 by the District Judge of Kistna in A. S. No. 451 of 1905. Prativadi Bhayamkaram Rukminiamma, one of the agraharamdars (through whom the present appellant (the 10 defendant) claims, was impleaded as the sixth defendant in the former suit and as the fourth respondent in the appeal to the District Court. She died in March 1908 nearly three years before the disposal of the appeal, and the appellant, who was the Receiver of the Nidadavole Estate, failed to bring on her legal representatives, nor were they made parties in the second appeal to this Court preferred by the plaintiffs in S. A. No. 838 of 1911. The District Judge has found the amount of the kattubadi in the present case to be *res judicata* against the 10th defendant, Sriman Madhabhushi Gopalacharyulu, on the ground that he was impleaded in the second appeal as the representative of the deceased Rukminiamma, but this appears to be an error as Prativadi Bhayamkaram Gopalacharyulu who was impleaded as the fourth respondent in the second appeal was the 9th defendant in the Original Suit and a different person from the present 10th defendant.

We must take it then that no legal representative of Rukminiamma, through whom the 10th defendant claims, was brought on after her death either by the contesting defendant in his appeal to the District Court, or by the plaintiffs in their Second Appeal to this Court. It has none the less been argued before us that the suit is *res judicata* as against the 10th defendant by virtue of Explanation VI of S. 11 of the Code of Civil Procedure, Act V of 1908 which says that "where persons litigate *bona fide* in respect of a private right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating." It is clear from the judgment of the District Judge in the previous suit, which was confirmed in Second Appeal, that the plaintiffs in the previous suit were litigating on behalf of themselves and the other agraharamdars whom they joined as defendants because they were unwilling to sue as plaintiffs, as regards the amount of kattubadi, and that they obtained a decree in the Munsif's Court which was reversed by the District Judge on the ground that the full amount of kattubadi claimed by the contesting defendant, the Receiver of the Estate, was payable; and the position therefore is that Rukminiamma, the 6th defendant and her heirs were not represented in the appeal when the District Judge set aside the decree which the plaintiffs had obtained on her behalf as well as well as their own, or in the second appeal preferred by the plaintiffs in which that decision was affirmed. If there had been no appeal to the District Court from the decree of the Subordinat Judge the issue as to the kattubadi would apparently have been *res judicata* in her favour by virtue of the explanation although she had been impleaded only as defendant and she remained *ex parte* because the relief had been claimed on her behalf, *Somasundara Mudali* v. *Kulandavelu Pillai* [1], and equally of course it would have been res judicata against her if her respresentative had been properly impleaded in the appeals. The question whether the explanation is applicable although Rukminiamma was not respresented either in the appeal or in the second appeal is of considerable difficulty. The explanation was first enacted as Explanation V of S. 13 of the Code of 1877 in which S. 30 (now Order 1 Rule 8) was first enacted. S. 30 was again taken with an important modification from O. XVI. R. 9 of the new Rules of the Supreme Court which embodied the practice of the Court of Chancery in representative suits as explained by Lord Eldon in *Cockburn* v. *Thomson* [2]. O. 16 R. 9 of the Rules of the Supreme Court under the Judicature Act provides that "where there are numerous persons having the same interest in one cause or matter, one or more or such persons may sue or be sued, or may be authorised by the Court or a Judge to defend in such cause or matter, on behalf or for the benefit, of all persons so interested," and, where a plaintiff properly so sues, the persons whom he represents are bound *Markt Co., Ltd.* v. *Knight, Steamship Co., Ltd.* [3]. The rule was reproduced in S. 30 of the Code of 1877 with this important modification that the permission of the Court is required to enable the plaintiff to sue in such a case, where as under O. 16 R. 9 no such permission is required in the case of plaintiffs. It therefore follows that in India the legislature considered that a plaintiff ought not to be allowed to represent the other parties interested in the case mentioned in the section without the leave of the Court. S. 11 and the explanation were enacted at the same time and must be read together and it has sometimes been

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[1] (1905) I. L. R. 28. Mad. 457.
[2] (1809) 16. Ves. 321=34 E. R. 1171.
[3] (1910) 2 K. B. 1021.

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stated that the explanation is applicable only to cases where the consent of the Court to the institution of the suit had been given under S. 30. *Thanakoti* v. *Muniappa* [1] *Baiju Lal Parbatia* v. *Bulak Lal Puthak* [2] *Srinivasachariar* v. *Raghavachariar* [3]. The explanation no doubt applies to such cases, but it is not in terms confined to them. It may be that, if a suit to which S. 30 is applicable were brought without the consent of the Court the plaintiff could not be considered to be litigating *bona fide* on behalf of the other persons interested, that is, not only honestly but with due care and attention, or in other cases in which he failed to implead parties who ought to have been joined, but it is in terms wide enough to include accidental slips where no real prejudice has been caused, and we should not in my opinion be justified in refusing to apply it to such cases. This is the view taken in *Rangamma* v. *Narasimha Charyula* [4] but before coming to that decision it is desirable to refer to the other decisions of this Court which have been cited. In *Varanakot Narayanan Nambudri* v. *Varanakot Narayanan Nambudri* [5] it was merely held that a decree against the karnavan of a Malabar tarwad, was binding on the other members of the tarwad, even though no order under S. 30 had been obtained. This proceeded on the ground that the karnavan sufficiently represented the other members of the tarwad without any order under S. 30, and even where the section was in terms inapplicable as where the members of the tarwad are not numerous. Similarly a widow sufficiently represents her husband's estate, and the nearest reversioner, it is now settled, sufficiently represents other reversioners in contesting an adoption which would exclude them all. This case does not seem to me to help us as the other matters of the tarwad were properly represented throughout the litigation by the karnavan. In *Thanakoti* v. *Muniappa* [1] a ryot had sued for damages to his crops caused by the defendants' diversion of certain water which the plaintiff claimed to be entitled to along with the other ryots of the village. The suit was dismissed on the ground that they had not the right claimed, but the explanation was held not to debar other ryots not parties to the former suit

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1. (1885) I. L. R. 8 Mad. 496. 2. (1897) I. L. R. 24. Cal. 385.
3. (1897) I. L. R. 28 Mad. 28, 32. 4. 31. M. L. J. 26.
5. (1880) I. L. R. 22 Mad. 228.

from bringing similar suits. This decision proceeded on the ground that the explanation was inapplicable as the plaintiff in the first suit had not sought any relief for the other ryots which is in accordance with the subsequent ruling of the Full Bench in *Somasundara Mudali* v. *Kulandavelu Pillai* [1], but the judgment also contains the following observations as to the effect of the explanation, "Now, unless the other plaintiffs were aware of the suit of plaintiff No. 3 and authorised him to make the claim for them (of which there is neither allegation nor evidence) Plaintiff No. 3 would have had no authority to claim on their behalf so as to bind them from afterwards bringing their own suit. One party having a right in common with others is not at liberty or authorized to sue in his own name to establish the right of others except by their authority. Explanation 5 must be read with the provisions of S. 30 and the principles to be found in that section. If that section had been followed which it was not, then the other plaintiffs would be bound." These observations may be read as meaning that in such a case the other ryots could not have been bound unless they were impleaded in the former suit on an order obtained under S. 30. That in my opinion might properly be so, because a plaintiff who sued on their behalf without impleading them could not be considered to be litigating on their behalf *bona fide i. e.*, with due care and attention and the explanation should not be read as setting at naught the ordinary rules as to the joinder of parties. Be that as it may, it is a very different case from the present one. In *Mahadevan* v. *Keshavan* [2] it was held that where four out of the five trustees sued to recover trust property the trust which was the real plaintiff was sufficiently represented and bound by the decision, and that the fifth trustee was not entitled to sue again on its behalf. The decision was so understood by the Full Bench in *Somasundara Mudali* v. *Kulandaivelu Pillai* [1] and does not I think really help either side. In *Chandu* v. *Kunhamad* [3] certain members of a Mahomedan family sued to recover their share in certain land joining the other members of the family as defendants and it was held that a subsequent suit by a plaintiff claiming under one of these defendants for the recovery of that defendant's share was barred under the explanation, but this decision was afterwards overruled by the Full Bench in *Somasundara Mudali* v. *Kulandavelu Pillai* [1] following the Full Bench in *Surendra Nath Pal Chowdhury* v. *Brojo Nath Pal Chowdhury* [2] on the ground that the plaintiff had not been suing in the first suit on behalf of the other members of the family impleaded as defendants but merely claiming his own share. *Latchanna* v. *Saravayya* [3] was to the same effect and was also overruled by the Full Bench in *Somasundra Mudali* v. *Kulandaivelu Pillai* [1]. It was held by the Full Bench in that case, overruling the decisions just cited that, where a co-sharer sues for his own share impleading the other co-sharers as supplemental defendants but not claiming any relief for them the decision is not *res judicata* against them although they were parties to the suit.

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[1] (1905) I. L. R. 28 Mad. 457.

[2] (1887) I. L. R. 11 Mad. 191.

[3] (1891) I. L. R. 14 Mad. 324.

In these cases the Court had not to consider a case where the plaintiff in the second suit had not been impleaded in the first suit or properly represented in it by virtue of an order under O. 1 R. 8 or otherwise.

The only decision of this Court governing the present question appears to be *Rangamma* v. *Narasimha Charyulu* [4] where it was held upon the language of the explanation that the decision in a suit brought by one agraharamdar to recover the suit property for himself and the other agraharamdars, fourteen of whom were impleaded as defendants 3 to 16 and remained *ex parte*, was *res judicata* in a subsequent suit for the same reliefs brought by the fourth defendant so impleaded and another agraharamdar who for some reason had not been made a defendant in the previous suit. The learned Judges held that the plaintiff in the former suit had been litigating bona fide in respect of a private right claimed in common for himself and others, and that the second plaintiff, though not a party to the suit was bound by virtue of the explanation.

The language of the explanation may seem dangerously general, and Edge, C. J., has observed in *Ram Narain* v. *Bisheshar*

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[1] (1905) I. L. R. 28 Mad. 457

[2] (1886) I. L. R. 13 Cal. 352.

[3] (1894) I. L. R. 18 Mad. 164.

[4] (1915) 31 M. L. J. 26.

Wallis, C. J.

Prasad 1 that we should be careful in applying it, and that it should not be applied to any case which does not come within its very wording. I entirely agree, and should certainly hesitate to hold that any litigation had been bona fide within the meaning of the Explanation in which there had been a substantial departure from the accepted rules as to the joinder of parties as for instance by suing without the leave of the Court in a case properly falling under O. 1 R. 8 or in suits as regards public rights without the authority prescribed in Ss. 91 and 92. At the same time, I cannot say on the strictest construction that the plaintiff's litigation in the earlier suit in this case was otherwise than bona fide within the meaning of the section. He impleaded all the other agraharamdars as defendants including Rukminiamma through whom the present 10th defendant claims, and they remained ex parte. When she died after being impleaded as a respondent in the first defendant's appeal to the District Court and before the hearing of the appeal, the failure to bring on her legal representatives was due to the default of the other side. When the plaintiff appealed to this Court from the decree of the District Court the fact that he did not implead the representative of the deceased 6th defendant who had been ex parte in the first Court and whose legal representatives had not been brought on by the other side in the District Court cannot in my opinion be said to constitute such a want of bona fides as to render the explanation inapplicable. On this ground therefore I would support the Subordinate Judge's finding that the 10th defendant in this suit who claims through the 6th defendant in the previous suit is bound by *res judicata* and would dismiss the second appeal with costs.

Spencer, J.

Spencer, J.—The question to be decided is whether the decision of the District Judge of Kistna in A. S. No. 451 of 1905 dated 1-12-1910 (Exhibit A in these proceedings) confirmed in Second Appeal by the High Court in Second Appeal No. 838 of 1911 on 7-8-1913 (Exhibit XVII) is *res judicata* against the 10th defendant, who is the appellant before us, on the point of Rs. 714-14 being the correct amount of kattubadi payable by the agraharamdars on the Gopavaram Agraharam. It appears that the 6th defendant in that suit, whose name was

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1. (1888) I. L. R. 10 All. 411.

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Prativadi Bhayamkaram Rukminiamma, was dead at the time when the High Court passed its remand order on 17-9-1909 and when the District Judge delivered his judgment on 1-12-1910, although her name was still kept on the record. The Subordinate Judge is of opinion that this defect is cured by the fact that the 10th defendant was on the record as Rukminiamma's legal representative when the High Court judgment finally disposing of the Second Appeal was passed on 7-8-1913.

The District Judge's judgment in A. S. No. 451 of 1905 shows the name of Prativadi Bhayamkaram Gopalacharyulu as the 6th respondent, and the same individual's name appears as 4th respondent in the High Court's judgment.

The 10th defendant's name is Sriman Madhabhushi Gopalacharyulu. The Subordinate Judge therefore appears to be in error in his statement that this 10th defendant was added as the legal representative of Rukminiamma in the second appeal to the High Court.

A suit instituted for settling the amount of kattubadi due to the Receiver of the estate upon this agraharam was one in which all the agraharamdars were necessarily interested. In Second Appeal No. 359 and 1789 of 1918 it was recently held by Krishnan J. and myself that agraharamdars are jointly and severally liable for all the jodi payable on their agraharam. We followed prior decisions of this High Court in *Ellaiya* v. *Collector of Salem* [1], *Ramayya* v *Subbarayudu* [2] and *Sobhanadri Apparao* v *Gopalakrishnamma.* [3]

Under Explanation VI to S. 11 of the C. P. Code when there is a final decision by a competent Court in respect of a private right claimed in common by parties to the suit and others and the litigation is conducted *bona fide*, all persons interested in that right are bound by the result of the litigation.

In *Rangamma* v *Narasimha Charyulu* [4] it has been held by Sadasiva Aiyar and Moore J J, that this explanation is not confined to suits brought under O. I. R. 8 by a few persons representing a numerous class after obtaining the Court's per-

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[1] (1866) 3 M. H. C. R. 59.

[2] (1889) I. L. R. 13 Mad. 25.

[3] (1892) I. L. R. 16. Mad 34.

[4] (1916) 31. M. L. J. 26.

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mission and after giving notice to others who may be interested. This decision followed the dictum in *Varanakot Narayanan Nambudri* v. *Varanakot Naraynan Nambudri* [1] under the Code of 1859. That was a case where a declaratory decree had been obtained against the karnavan of a tarwad. A decree to which a karnavan is a party binds the other members of the tarwad because he is their recognised representative in suits, as was well settled by a Bench of Four Judges in *Vasudevan* v. *Sankaran* [2]. But *Rangamma* v. *Narasimhacharyulu* [3] and the case before us are instances of private rights claimed by some individuals in common with others rather than as representatives of a body of persons. *Somasundara Mudali* v. *Kulandaivelu Pillai*[4] was a Full Bench case under the Code of 1882. The words "claimed in common" occurring in explanation V to S. 13 of that Code and repeated in explanation VI of the present Code are explained therein as referring to rights to relief which would benefit such parties by being granted and give them such an interest as would enable them to join as co-plaintiffs under S. 26. (Now Order 1 Rule 1.)

There can be no doubt that agraharamdars have such a common interest, for as each agraharamdar can be made to pay the whole of the Jodi if others do not pay, all are equally interested in the demand being decreased to the lowest possible figure, or at least not being increased.

Judged by this standard, I feel clear that the decision in A. S. No. 451 of 1905 is binding on the parties to this suit including the 10th defendant, as that litigation was, so far as it appears conducted *bona fide*.

But Mr. T. R. Ramachandra Aiyar has sought to draw a distinction in a case where a party is represented at one stage of the suit and afterwards ceases to be represented owing to a failure to bring his legal representatives on record. If such cases are to be made exceptions to the general rule it would be necessary to import words in Explanation VI to S. 11 which are not there. "All persons interested in such right" must then be understood as meaning "all persons who are not already parties to the suit and are interested in such right."

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[1] (1880) I. L. R. 2 Mad. 328.
[2] (1897) I. L. R. 20 Mad. 129.
[3] (1916) 31 M. L. J. 26.
[4] (1905) I. L. R. 28 Mad. 457.

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I see no reason to put such a limited construction on the plain words of the explanation.

I agree with my Lord the Chief Justice that the lower Court's decision is right and that this appeal should be dismissed with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

FULL BENCH.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE OLDFIELD AND MR. JUSTICE SESHAGIRI AIYAR.

Amirthammal ... *Plaintiff.**

v.

Madalakaram *alias* Ramalinga Goundan ... *Defendant.*

F. B.

Amirthammal v. Ramalinga Goundan.

Stamp Act—S. 2 (5); *arts.* 15 *and* 40 *of Sch. I—Court Fees Act, Sch II art.* 6—*Applicability—Receiver appointed by Court—Security bond given by him in favour of Court—Stamp payable on—Bond pledging immoveable properties—Effect.*

Where a Receiver, appointed by a Court and directed by it to furnish security for the proper discharge of his duties as Receiver, executed a security bond in its favour binding himself and his heirs in the sum of Rs. 150 and as security thereof pledging immoveable property worth Rs. 200, *held* that the bond must be stamped both under the Court Fees Act and under art 40 of Schedule I of the Stamp Act, as it came within the definition of a mortgage in S. 2 (5) of the Stamp Act.

Case referred under S. 60 of the Indian Stamp Act (II of 1899) by the District Munsif of Tiruvannamalai in Execution Petition No. 220 of 1919, in Small Cause Suit No. 1275 of 1915, as to the proper stamp on an instrument by which a receiver binds himself and his properties.

The document was as follows :—

"Security bond executed on 30th April by Amirthammal, daughter of Chinnu Pillai, Yadaya caste, Vishnu religion, cultivation (profession), aged about 40, in favour of the District Munsif of Tiruvannamalai, showeth:—

"I am plaintiff in the suit and in execution of the decree by which defendant owes me Rs. 112-15-9. I attached the registered mortgage debt of Rs. 75 executed by one Thandavaraya Goundan on 11th August 1917 to defendant. As it is necessary to collect the said mortgage, and to credit it towards my decree against defendant, and as I have petitioned the Court to appoint me as receiver for the said purpose of collecting the debt, I shall act with all possible diligence and

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* Ref. Case No. 7 of 1919. 22nd January 1920.

F. B.

Amirthammal v. Ramalinga Goundan.

care in the said task of collecting the debt. If it is necessary to file a suit to recover the mortgage debt, I shall defray the costs thereof from my own funds, and deduct the same from the sum that may be recovered. I shall render due and proper account (of any and every sum collected) then and there. I do not require any remuneration or commission for my labour. For the proper discharge of the aforesaid obligation I bind myself and my heirs in the sum of Rs. 150, and as security thereof I pledge undermentioned immoveable property which is mine and which is in my possession and enjoyment, and worth Rs. 200. This is the security bond written with my free will and consent.

The Government Pleader on behalf of Government.

The judgment of the Court was delivered by

The Chief Justice:—Following the decision in *Kulwanta* v. *Mahabier Prasad*[1] and Ref. case 19 of 1911 we hold that the bond must be stamped both under the Court Fees Act and under Article 40 of Schedule I of the Stamp Act, as it comes within the definition of a mortgage in S. 2 (5) of the Indian Stamp Act, and article 15 is therefore inapplicable. In Ref. case No. 9 of 1908 the the point that the bond in question was a mortgage within the meaning of the definition does not appear to have been taken. *In re The District Munsif of Tiruvallur*[2] the bond, which was given by a judgment-debtor and two sureties does not appear to have been a mortgage bond and consequently came within article 15.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE PHILLIPS.

Jakkam Reddi Seshadri Reddi and others ... *Appellants.** (*Defendants.*)

v.

Sir S. Subramania Aiyar, K.C.I.E. ... *Respondents* (*Plaintiffs* 1 and others *and 3 to 5*).

Seshadri Reddi v. Suberamani Aiyar

C. P. Code of 1908—*S.* 92—*Suit under—Suit bad for want of requisite interest on the part of one of plaintiffs—Subsequent addition of other persons having requisite interest and obtaining sanction for very same suit—Effect—Maintainability of suit*

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* Appeal No 182 of 1919. 21st January, 1920.

[1] (1888) I. L. R. 11 All 16 (F. B).

[2] (1911) I. L. R. 37 Mad. 17.

Where in a suit instituted under S. 92 C. P. C., one of the plaintiffs was found to have no interest such as that required by the section and thereupon two other men who had the requisite interest applied to the Collector and obtained sanction to institute the same suit and were then added as 3rd and 4th plaintiffs, *held* that the suit was not liable to be dismissed on the ground that it was bad as laid and that the requirements of S. 92 were not satisfied by adding 3rd and 4th plaintiffs in the same suit.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Nellore in O. S. No. 61 of 1917 (O.S. No. 47 of 1917 of the District Court.)

K. N. Kumaraswami Aiyar, for the Appellants.

T. V. Venkatarama Aiyar and *P. R. Ganapathi Aiyar*, for Respondents.

The Court delivered the following

Judgment :—One of the Plaintiffs in this suit which was instituted under S. 92, Civil Procedure Code was found to have no interest such as that required by this section. Thereupon two other men who had the requisite interest applied to the Collector and obtained sanction to institute this very suit. They were then added as third and fourth plaintiffs. Objection was, however, taken by the defendants to the effect that the suit was bad as laid and must be dismissed and that the requirements of S. 92 were not satisfied by adding 3rd and 4th plaintiffs in the same suit. The learned Subordinate Judge heard the objection discussed it and came to the conclusion that the suit was not properly instituted and dismissed it. There is a ruling of this Court in *Ramayyangar* v. *Krishnaaiyangar* [1] which would cover the present case ; but it was argued that in the old Code no such clause as that in the sub-paragraph 2 of S. 92 occurred in S. 539 and that the latter paragraph makes a difference. We find however that the ruling in *Ramayyangar* v. *Krishnaiyangar* [1] has been followed in some very recent cases of this Court decided under the New Code. One of them is a decision of Oldfield and Bakewell, J. J., in Appeals Nos. 310 and 373 of 1918 and the other is the judgment of Spencer and Krishnan, J.J., in Civil Revision Petitions Nos. 892 and 893 of 1919. On the other hand there is a ruling of the Bombay High Court in *Darves Haji Mahamad* v. *Jainuddin* [2] contrary to the view taken

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1. (1886) I. L. R. 10 Mad. 185.
2. (1906) I. L. R. 30 Bom. 603.

in these cases. And the Allahabad High Court seems to have taken the same view of the law as the Bombay High Court. But the matter being purely one of procedure we think we ought to follow the rulings of this Court. The Judgment of Subordinate Judge is set aside and the case will be remanded to him for disposal on the merits, the memorandum of objections being allowed.

Costs of the memorandum of objections will abide the result. The appeal is dismissed with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, C. J., AND MR. JUSTICE OLDFIELD AND MR. JUSTICE SESHAGIRI AIYAR.

Reference under Stamp Act.

Secretary to the Commissioner, Salt and Akbari and Separate Revenue Referring Officer.

Secretary to the Commissioner of Salt
and Abkari and Separate Revenue,
Madras. ... *Referring* Officer.*

Stamp Act (II of 1899)—S. 5.—Instrument relating to several distinct matters—Sale-deed. Mortgage by vendor of lands not included in sale as security for due performance of covenants—Stamp on deed.

Where, in a sale-deed the vendor mortgaged lands not included in the sale as security for the due performance of his covenants, *held* that the deed was not an instrument comprising or relating to distinct matters within the meaning of S. 5 of the Stamp Act and was not liable to be stamped both as a sale and as a mortgage. *Govindan Nambudri* v. *Moideen* [1], overruled.

Case referred under S. 57, Indian Stamp Act II of 1899 by the Secretary to the Commissioner of Salt, Abkari and Separate Revenue, Madras, as to whether the 3 sale-deeds referred to in his letter are to be treated each as relating to two distinct matters and chargeable to stamp duty both as sale-deeds and as mortgages.

The sale-deeds were as follows :—

(1) (Engrossed on a stamp paper of the Value of Rs. 10) Sale for Rs. 1,000.

Sale deed of ayan nanja lands, dated 18th December 1918, corresponding to 4th Margali 1904 by Vendantam Aiyangar, son of Desikam Krishna Aiyangar Avargal, Brahman, ryot, Vadakku Karukurichi, Ambasamudram taluk in favour of Subrahmanyan Chettiar, minor aged 6, son of A. Ramakrishna Chettiar, Dhanavasyal, ryot, residence as above, represented by his father and guardian.

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* Referred Case No. 8 of 1919. 22nd January, 1920.

[1] (1917) I. L. R. 41 M. 469.

F. B.

Reference under Stamp Act.

Secretary to the Commissioner, Salt and Akbari and separate Revenue, Referring Officer.

I have this day sold to you on behalf of the abovementioned minor on receipt of Rs. 1,000 as detailed below, the property described in the Schedule which has been in my enjoyment, having been purchased out of my own earnings from Muttu Mooppan of Vadakku Karukurichi, and delivered unto you the possession thereof. As I have sold the schedule land for a consideration of Rs. 1,000 you are to enjoy the property with conveyance and other absolute rights.

DETAILS OF PAYMENT.

I am in receipt of Rs. 1,000 by means of the sale-deed executed this day in my favour by you for yourself and as guardian of the minor. The sale-deed (relating to the property sold) in my name and its two previous title-deeds are also handed over to you. I declare that no encumbrance has been previously made, on the property. If there be any such encumbrance and in case any damage happens to the property in Schedule I, you may realize all kinds of losses likely to be incurred thereby from the property specified in Schedule II within a period of twelve years.

Schedule I ....

Schedule II ....

(2) (Engrossed on a stamp paper of the value Rs. (10) Sale-deed dated 30th January 1919, executed by Phillip Jerome Lewis, son of Bastian Lewis, Roman Catholic, cultivator, residing at Divikudru (Islet called Divi) in Moodu Tonse (East Tonse) village, Udipi taluk, in favour of Margaret Marceline Lewis Bayee, wife of Gregory Lewis, son of the executant and daughter of Padu Tonse Manuel George Lewis, same caste residing at Baligara Kudru (Islet called by that name) in Padu Tonse (West Tonse) village in the said taluk. Whereas the debt incurred by me on mortgage of the property shown below for the legitimate needs of my family remains still undischarged and whereas it goes on increasing by the accumulation of interest as I have no means of repaying it and as it assumes threatening proportion giving rise to the probability of swallowing up all my property involving thereby much loss and trouble to me; in order to check and avoid such a contingency as well as to keep intact what little may remain (after meeting the debts) I am constrained to put up for sale the property described below being part of my portion obtained under the deed of partition between myself and others : executed on 6th October 1894 and registered as No. 1443 of 1894 of Book 1, Volume 148, pages 139 to 143 of Sub Registration Office, Udipi, and which I have been enjoying by full right so far, having the patta in my name and paying the assessment thereof, and since you have offered it the highest price out of your own money I hereby agree and sell it to you for Rs. 1,000

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Reference under Stamp Act

Secretary to the Commissioner Salt and Akbari and separate Revenue: Referring Officer.

and give possession thereof to you. Whereas, you will pay the sum of Rs. 1,000 to Potail Pedru George Rebello of Moodu Tonse village and obtain receipt therefor being part and interest thereon as well the interest on the accumulated interest of the debt of Rs. 1,200 I owe him on the mortgage of this and other properties of mine secured by a deed executed on the 10th February 1913 and registered as No. 154 of 1913 of Book I Volume 260, pages 316 to 319 in the office of the Sub-Registrar of Udipi. I hereby acknowledge the receipt in full of the said amount and declare nothing more is due to me. Therefore from this day you and your heirs and representatives may enjoy the said property improving it as you please and getting in patta transferred in your name and also paying the assessment. I, my heirs and representatives have no claim to say that we have any more right in the said property or that we must be paid something more as consideration, or even to say that you owe us any part thereof. Except that this property is included in the above mortgage to Potail Pedru George Rebello together with other properties, it is free from any other incumbrance or attachment or injunction or other securities. Although this property is included in the mortgage-deed to the abovesaid Pedru George Rebello, since I have released it from the said mortgage and sold it to you the remaining properties only, described in the said mortgage-deed stand as securities for the balance of debt I owe him and the discharge of which is incumbent on me. Should I fail to do so and consequently should you sustain any loss up to Rs. 1,000 on account of any suit over this property I bind myself, my heirs and representatives, to pay you such amount with interest thereon on the security of the properties on the abovesaid mortgage deed, *i.e.*, properties shown below as well as on my personal security. As long as you fail to pay the debt shown in this deed you are liable to pay interest thereon.

Schedule. Description of the property sold............Description of the Property offered as security.......................

(3) (Engrossed on a stamp paper of the value of Rs. 10) Deed of sale dated 24th October 1918 executed by Chinnappa Pillai, son of Virabhadra Pillai, Ambalagar, Savite, ryot residing at Prathaparamapuram, Negapatam taluk, for himself and as guardian of his minor sons Subbayyan and Murugayyan in favour of Muhammad Kasim Rowther, son of Pichai Rowther, Muhammadan, ryot, residing at Rituppundi West Sethi, Negapatam taluk.

I hereby sell to you that piece and parcel of land along with trees on it, described in the schedule hereunder which I got by partition and which is in my sole possession for a consideration of Rs. 500 (five hundred). This sum of five hundred rupees I have received as

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particularized below, *viz.*, Rs. 231-4-0 for the discharge by you of a mortgage-deed executed by me for Rs.200 in favour of one Sinnathambi konan of Prathaparamapuram, on the security of the undermentioned land which with the principal and interest aggregates to Rs. 231-4-0, and Rs. 268-12-0 which I have agreed to receive in cash in the presence of the Sub-Registrar at the time of registration, for the payment of purchase money due to one Nariappa Konan, son of Naga Konan of Mahakkudayan from whom I have purchased land.

Thus I have received the full amount of Rs. 500, the consideration for the sale. Therefore by this deed, I convey to you the said land with trees, etc., thereon and you may henceforth enjoy the land with all absolute rights of alienation and inheritance.

In the event of you being disturbed from enjoying the property sold to you by any claim, I hereby bind myself to indemnify you against any loss you might incur on the security of the undermentioned immoveable property which belongs to me by purchase from one Nariappa Konan."

The Government Pleader

V. Ramesan, for the Referring Officer.

The Court delivered the following

Judgment:—After hearing the learned Government Pleader and considering the authorities cited we are of opinion that the three sale-deeds in question, in each of which the vendor mortgages lands not included in the sale as security for the due performance of his covenants, need not be stamped both as sales and mortgages by virtue of the provisions of S. 5 of the Indian Stamp Act 1899, as the sale-deeds are not instruments comprising or relating to distinct matters within the meaning of the section. The decision in Reference by the Board of *Revenue* [1] is not in point, as the terms of S. 14 of Act XVIII of 1869 under which it was decided are different from those of S. 5 of the present Act, which was substituted for it in S. 7 of Act I of 1879, which again is practically identical with S. 4 a (1) of the English Stamp Act 1891. In *In the matter of a reference* Act of *under S. 46 of the Stamp Act* a decision under S. 7 of the 1879, it was held that an instrument by which a debtor leased certain lands to his creditor and empowered the latter to apply a portion of the annual rent in satisfaction of the debt was both a lease and a usufructuary morgage but only required to be stamped

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1. (1876) I. L. R. 1 Mad. 183.

2. (1881) I. L. R. 8 Cal. 254.

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Secretary to the Commissioner Salt and Abkari and separate Revenue Referring Officer.

as a mortgage as it did not relate to two distinct matters within the meaning of the section. In *Reference under Act No. 1 of* 1879 (*Indian Stamp Act*) S. 49 [1] it was held that an instrument by which certain parties took lands on lease and hypothecated other lands as security for the rent did not relate to distinct matters but only to the terms on which the lessors let the land and the lessees took the holding. In *Reference under Stamp Act* S. 57 [2] a lease which contained a covenant for renewal was held not to relate to two distinct matters as the option to renew the lease was merely ancillary to the lease and formed part of the consideration for entering into it. Similarly in *Reference under Stamp Act, S. 57,* [3] though it was held that the agreement between the company and each of the ryots who were parties to it constituted distinct matters within the meaning of the section, the agreement with each ryot by which in consideration of a payment of one rupee, he granted a license to prospect, agreed to sell if required and covenanted to indemnify the company against claims by other persons was held not to relate to distinct matters so as to require separate stamps. The same test was applied in England in *Price* v. *Thomas* [4] where it was held that an instrument of lease in which both the lessee and a third party covenanted to pay the rent did not require to be stamped both as a lease and as a deed, Littledale, J., observing that the lease was the principal, to which the covenant was an accessory, and Parke, J., that the convenant was part of the consideration for granting the lease. In *Govindan Nambudiri* v. *Moidin* [5] which was decided without argument, the answer would no doubt have been to the same effect if these authorities had been brought to the notice of the Court, and we think that that decision should not be followed in future cases.

A. S. V.

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[1] (1894) I. L. R. 17 All. 55.

[2] (1901) I. L. R. 25 Mad. 3.

[3] (1899) I. L. R. 24 Mad. 176.

[4] 2 B & A. 128.

[5] (1917) I. L. R. 41 Mad. 469=33 M. L. J. 693.

PRIVY COUNCIL.

PRESENT:—VISCOUNT FINLAY, LORD SUMNER AND LORD PARMOOR.

The Trustees for the Improvement of Calcutta ... *Appellants.**

v.

Chandra Kanta Ghosh ... *Respondent.*

P.C.

The Trustees for the Improvement of Calcutta *v.* Chandra Kanta Ghosh.

Land Acquisition—Improvement Schemes—Recoupment, principle -Land affected by the execution of a scheme—Calcutta Improvement Act, (Ben. Act V of 1911) Ss. 41 42, 69, 81.

Under S. 42 of the Calcutta Improvement Act, 1911, an improvement scheme, may provide for the acquisition by the Board of Trustees appointed under the Act of any land comprised in the scheme which will in their opinion be affected by the execution of the scheme.

Held, that land is affected by the execution of a scheme whenever its value is thereby enhanced or diminished.

It is not necessary that the land should be physically affected by the operation of the scheme, or that it should be injuriously affected by severance or otherwise.

Held also, that even though the land is only taken for the purposes of recoupment the Board has the same powers of compulsory acquisition, and the assessment of the value is regulated by the same principles, as if the land were required for the actual working of the scheme: that if it is required for any of the purposes of the Act, whereof recoupment is one, the provisions for compulsory acquisition apply.

Appeal from a decree of the Calcutta High Court, affirming a decree of the First Subordinate Judge of the Twenty-four Pergunnahs.

The facts of the case will sufficiently appear from their Lordships' judgment and from the report of the High Court proceedings at 44 Cal. 219. From these it will be seen thut Mookerjee and Cuming, JJ., affirmed the view of the Trial Court that the powers of compulsory acquisition which the Act conferred upon the Trustees did not extend to cases where the land was only acquired for the purpose of recoupment and because it was believed that its value would be enhanced by the scheme. On this appeal

Sir John Simon, K. C., Dunne, K. C., Sir W. Garth, K. C., and *G. B. Mac Nair,* for the Appellants, submitted that the decisions of the Lower Courts were erroneous. The Trustees had power to acquire the land in suit under S. 41 of the Calcutta Improvement Act. It was sufficient under that section that the land was in their opinion, required for the execution of the scheme. It was not necessary that it should be land required for the actual widening of Russa Road-land to form part of the widened road. That the powers of acquisition were not confined to such land was clear from S. 39,

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* Oct, 31 Nov. 5, 6 and 19, 1919.

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which gave power to acquire land for the purposes of laying out the area with new roads and of forming building sites. But in any case there is power under S. 42 to acquire any land which will, in the opinion of the Board, be affected by the execution of the scheme. This does not mean merely "physically affected": It is sufficient that the land is affected in value. A Full Bench of the Calcutta High Court has rightly decided, since this case was heard, that the Calcutta Improvement Act authorises the Board to acquire land compulsorily fot purposes of recoupment, either by selling or otherwise dealing with the land under S. 81 or by abandoning it in consideration of a payment by the owner under S. 78. *Mani Lal Singh* v. *Trustees for the Improvement of Calcutta* [1]. We rely on and adopt the reasoning of Woodroffe, J., in the order of reference in that case (page 346).

Any other interpretation of S. 42 of the Act makes that section almost meaningless: it cannot have been intended merely to authorize the acquisition of land which is afterwards found not to be wanted. It is argued against us that S. 42 might be arbitrarily or improperly applied, if it has the scope for which we contend: but there is little danger of this, as under S. 49 the sanction of the Local Government is required for the scheme.

The powers conferred upon a public body entrusted by the legislature with the duty of making public improvements in a city are not to be construed so severely and restrictively as if those powers were bestowed upon a body of adventurers: *Galloway* v. *The Mayor and Commonalty of London.* [2] (Reference was also made to Ss. 40, 68, 69, 81 and 122 of the Act.)

Upjohn, K. C., De Gruyther K. C. and *Dube* for the respondents: The land here was not required for the execution of the scheme under s. 41 of the Act: the resolution provides only for the widening of Russa Road, and it is not contended that it was needed for that purpose. S. 42 does not bring into the Act any land which is not part of the scheme for the execution of the works. If it had been intended to introduce into the Act the principle of recoupment it would not have been done by mere inference as appellants contend, but on specific terms not admitting of mistake. There is a whole chapter of the Act devoted to finance, and such a provision, if it were desired to introduce it would have been included in that Chapter. "Land affected" in S. 42 (a) must mean land which is itself affected,

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[1] (1917) I. L. R. 45 Cal. 343.

[2] (1866) L. R. 1 H. L. 34.

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not land the value of which is affected. "Affected" here has the same meaning as "injuriously affected" in the Lands Clauses Act, 1845 : it covers a "physical interference with a right, whether public or private, which an owner (of land) is entitled by law to make use of, in connection with the land. *Metropolitan Board of Works* v. *Mc Carthy* [1].

The phrase "injuriously affected" is adopted in S. 23 of the Land Acquisition Act (I of 1899). One subject of S. 42 is to enable the Trustees to take land in respect of which they anticipate a heavy claim for severance under that section. There has been no expression of opinion by the appellants, either by resolution or otherwise, that the land in suit is in fact affected by the scheme. We submit that it was included in the scheme merely in order to hold us to ransom under S. 78 of the Act.

Sir John Simon, K. C., in reply referred to the terms of the Resolution published in the Calcutta Gazette, which set out that the land was "required to be taken by Government at the expense of the Calcutta Improvement Trust for a public purpose, *viz.*, for the Street Scheme known as the Scheme No. IV" &c.

Their Lordships' judgment was delivered (Dec. 16, 1919) by

Lord Parmoor.

Lord Parmoor :—This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal dated the 22nd August, 1916, affirming a judgment and decree of the First Subordinate Judge of the 24 Pergunnahs. The respondent brought the present suit for a declaration that the appellants had no power under the provisions of a Road Improvement Scheme, framed under the Calcutta Improvement Act of 1911, to acquire certain land owned by him, and that all proceedings in connection with the acquisition of such land were *ultra vires* and of no effect. Both the Lower Courts have decided in favour of the respondent, holding that the land in question is not required for the Road Widening Scheme and that its acquisition for any other purpose is not warranted under any of the provisions of the said Act. The appellants obtained leave to appeal to His Majesty in Council and submit that the judgments and decrees of both Courts should be reversed and the suit dismissed.

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[1] (1874) 7 H. of L. 243 at p. 253, 256.

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Lord Parmoor.

The decision of the appeal depends upon the construction to be placed on certain sections of the Calcutta Improvement Act, 1911, an Act under which improvement Schemes for Calcutta may be framed by the appellants (therein called the Board) and sanctioned by the Local Government. Whenever the Local Government does sanction an improvement scheme, there is a duty to announce the fact by notification, and the publication of a notification is conclusive evidence that the scheme has been duly framed and sanctioned. This provision does not affect the right of the respondent to institute a suit to have it declared that the Board in framing the scheme acted *ultra vires*, or that the scheme as sanctioned does not authorise the appellants to acquire by compulsion the land in question. During the course of the argument the attention of their Lordships was directed to a number of decisions upon various Acts of Parliament giving a compulsory power for the acquisition of land, but in each case the decision must depend upon the provisions of the particular Act and the purposes for which and conditions under which in such Act land may be complulsorily acquired. It becomes necessary, therefore, to consider what were the considerations on which the Board acted in framing the scheme, and whether the scheme as sanctioned gives the Board the powers which they are seeking to enforce.

The preamble of the Act recites in general terms that it is expedient to make provision for the improvement and expansion of Calcutta by opening up congested areas, laying out and altering streets, providing open spaces for purposes of ventilation or recreation, demolishing or constructing buildings, acquiring land for the said purposes, and for the re-housing of persons of the poorer and working classes displaced by the execution of improvement schemes, and otherwise as thereinafter appearing. It is not necessary further to consider the preamble.

S. 2 enacts that an improvement scheme means a general improvement scheme or a street scheme, or both. In the present case the scheme was a street improvement scheme framed for the purpose of creating new, or improving existing, means of communication and facilities for traffic. S. 39 enacts (*inter alia*) that whenever the Board are of opinion that for the purpose of creating new or improving existing means of communication

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and facilities for traffic, it is expedient to lay out new streets or to alter existing streets (including bridges, causeways and culverts), the Board may pass a resolution to that effect and shall then proceed to frame a street scheme for such area as they may think fit.

At a meeting of the Board on the 17th September, 1912, Resolution No. 5 was passed. This resolution was approved at a meeting of the Board on the 8th October, 1912, at which it was resolved that the scheme for the widening of Russa Road, as far as Hazra Road, prepared in accordance with Resolution No. 5 of the 17th September, 1912, should be adopted, and notices issued under S. 43 and 45.

It was argued on behalf of the respondent that lands had been included by the Board within the area of the scheme, not because they were wanted for any of the purposes of the Act, but with the object of exacting an exemption fee from the owners, although the Board were actually not anxious to acquire the buildings and would possibly, or probably, fail to make a profit if they did actually acquire and resell the land. Under S. 78 owners may apply to the Board requesting that the acquisition of their land should be abandoned in consideration of the payment of a sum to be fixed by the Board in that behalf. The object of this section is to give an opportunity to owners of land to request the abandonment of its compulsory acquisition, and it only comes into operation where land has been properly included in a scheme, as required for purposes of the Act. To have included land within the area of the scheme, not because it was wanted for purposes of the Act, but in order to exact an exemption fee from the owner, would, in the opinion of their Lordships, have been a misuse of the powers conferred upon the Board, and if in fact the Board had included the land of the respondent in the scheme merely for the purpose of exacting exemption fees, the Board would have acted *ultra vires* and the respondent would have been entitled to succeed in his action, although it might have been anticipated that, by means of such fees, funds would be obtained to ease the burden of the expenditure to be incurred in the execution of the scheme. After the

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scheme had been sanctioned, an application of the respondent requesting that, under S. 78, the acquisition of his land should be abandoned, in consideration of a payment by him, was considered by the Board and rejected on the ground that his land was required for the "lay out," which evidently refers to the lay-out of land not actually required in the execution of the street widening. The same expression is to be found in the evidence of Mr. Bompas, the chairman of the Board, but their Lordships do not find that the evidence of Mr. Bompas is in any way inconsistent with the inference to be drawn from the record of what passed at the Board when resolution No. 5 was passed on the 17th September, 1912.

On the 17th September, 1912, a proposal was brought before the Board in favour of gazetting all land from which there was a reasonable chance of obtaining an exemption fee. This proposal was directly negatived, and only two members of the Board voted in its favour. In the opinion of their Lordships this decision disposes of the allegation that the Board framed the area of the scheme on the principle of including land for the purpose of exacting exemption fees, whether or not such land might, in their opinion, be required for the execution of the scheme or affected by the execution thereof.

At the same meeting, and after the above proposal had been negatived, the chairman asked for definite instructions in regard to the Russa Road scheme, and, after voting, it was determined that all properties abutting on the Russa Road should not be gazetted for acquisition, but only those properties which as a matter of fact it would pay the Board to acquire and sell again. The effect of this decision would be to limit the proposal of land acquisition to those properties only of which the value, in the opinion of the Board, might be enhanced by the execution of the scheme, or, in other words, to those properties from which a sum, in the nature of recoupment, might, in the opinion of the Board, be obtained in aid of the expenditure to be incurred. Finally, the chairman asked the opinion of the Board as to the area which should be included in the Russa Road scheme. There were three alternative projects. It was decided that the scheme should provide only for the widening of Russa Road and the taking up of recoupment purposes of land unoccupied or occupied by buildings of small value. A plan showing the area finally included in the scheme was submitted to the Local Government, and a copy, as sanctioned, was produced before their Lordships. It is not suggested that the land of the respondent is, required for the execution of the road widening, and it is, at no point, nearer than 55 feet to the widened line on the west side of the street.

After an improvement scheme has been framed certain notices must be given, and after the hearing of persons entitled to make objection, representation of dissent, the Board may apply to the Local Government for sanction of the scheme. The sanction of the Local Government was notified in the Calcutta Gazette of the 21st January, 1914, and the publication of a notification in respect of any scheme is conclusive that the scheme has been duly formed and sanctioned. It becomes necessary, however, to consider whether the Board had authority under the Act to frame a scheme on the terms of resolution No. 5 of the 17th September, 1912, and secondly, whether, if the scheme was duly sanctioned by the Local Government, it gives the Board the powers of compulsory acquisition of the land of the respondent.

Section 41 of the Act enacts that every improvement scheme shall provide for the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be required for the execution of the scheme. It was argued on behalf of the Board that the land of the respondent came within the provision of S. 41, in that it was land which, in the opinion of the Board, was required for the execution of the scheme. It is not necessary to consider what might be included under the terms of S. 41, but the scheme, now under consideration, was a scheme for the widening of Russa Road, as far as Hazra Road, and it cannot be said that the land of the respondent was required for the execution of this widening. As already stated the land of the respondent at the nearest point was 55 feet away from the western border of the Russa Road after it had been widened to 100 fee as proposed in the scheme.

The case really depends upon the construction of S. 42. Under this section, an improvement scheme may provide for the acquisition by the Board of any land in the area comprised in the scheme which will, in their opinion, be affected by the execution of the scheme. The land of the respondent is within the area delimited on the plan attached to the scheme, but it was argued on his behalf that it was not land affected by the execution of the scheme. The land was included in the schme because in the opinion of the Board, it would pay them to acquire it and sell it again, and the question arises whether land can be compulsorily purchased in order that the Board may have the benefit of such enhanced value, and use any profit on the transaction in ease of the burden of the public expenditure. "Land" is defined to have the same meaning as in the Land Acquisition Act, 1894, in which the expression "land" includes benefits to arise out of land; but, apart from this definition, land would, using language in its ordinary natural sense, be said to be affected by the execution of a scheme, whenever its value was thereby either enhanced or diminished. It is not immaterial to observe that there was at the date of the passing of the Calcutta improvement Act no novelty in the recoupment principle (*Galloway* v. *London Corporation* [1]). But whether this principle has been sanctioned in the Calcutta Improvement Act must be determined on the language used, and the case of *Donaldson* v. *South Shields Corporation* [2] shows, if authority is necessary, that where an Act authorises land to be taken for the actual works only, a local authority, or other public body, will be restrained from taking more than is actually necessary for such works. There would appear to be nothing either in the general scheme of the Act, or in the special context, which is inconsistent with giving the word "affected" its ordinary and normal sense; but it was suggested in the argument on behalf of the respondent that the Act did not authorise the Board to acquire land unless such land was either physically affected by the execution of the scheme, or injuriously affected, whether by severance, or in some other manner. Land which would be physically affected by the scheme comes under the provision of Section 41, and to limit the land which a Board may acquire

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1. (1886) L. R. 1 H. L. 34.
2. 79 L. T. 685; 68 L. J. Ch. 162.

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under Section 42 to the land, which they must acquire under S. 41, would be in effect to make illusory the powers granted in Section 42. The meaning of the phrase "injuriously affected" was well known in compensation law and practice when the Calcutta Improvement Act was passed, and the phrase occurs in Section 23 of the Land Acquisition Act, 1894, To introduce the limitations connoted by the word injuriously would be in effect to alter the language of the section, and, had the Legislature desired to introduce this limitation, there would have been no drafting difficulty of any kind. A special argument that S. 42 should be limited to cases of severance was based on the terms of S. 49 of the Land Acquisition Act, 1894, as read in conjunction with S. 42 and S. 78 of the Calcutta Improvement Act, 1911. S. 49 of the Land Acquisition Act, 1894, is a section not unusual in Acts giving power for the compulsory acquisition of land, and enacts that the provisions of the Act shall not be put in force for the purpose of acquiring a part only of any house, manufactory or other bulding, if the owner desire that the whole of such house, manufactory, or other building shall be so acquired. There is no limitation to cases of severance either in S. 42 of the Calcutta Improvement Act, 1911, or S. 78, and there is no ground for implying any limitations as affecting the authority of the Board for the acquisition of land under S. 42. The result is that, in the opinion of their Lordships, none of the suggested limitations to the usual and normal meaning of the word "affected" in S. 42 are admissible, and that there is no reason, either in the general purpose of the Act or the special context, that the word should not be construed in its ordinary sense, and that, as so contrued, S. 42 authorises the acquisition of the land of the respondent, which was inserted in the scheme because, in the opinion of the Board, it would be enhanced in value by its execution.

Among the cases called to the attention of their Lordships was that of *The Metropolitan Board of Works* v. *Mc Carthy* [1]. In that case McCarthy was a lessee and occupier of a house in close proximity to a draw-dock which opened into the Thames. He had no right in any way to the use of the dock except as one of the public, but his premises being in close proximity to it, his use of it for the purposes of his business was very constant. The dock was entirely destroyed by the works of the Thames Embankment, and McCarthy sought compensation. The case submitted to the Court stated that "by reason of the destruction of the dock, and the destruction thereby of the access to and from the Thames, the plaintiff's premises became and were, as premises either to sell or occupy in their then condition and with reference to the uses to which any owner or occupier might put them in their then state and condition, permanently damaged and diminished in value," It was held in this case that McCarthy was entitled to compensation, but if in such a case compensation was properly given to the owner, it would not appear to be unfair that where premises in close proximity to a widened street are thereby enhanced in value, such value should enure to ease the burden of public expenditure provided that the interests of the owner are properly protected. In this case the respondent would be entitled to the value of his land assessed on the same principle as the value of land actually required for the execution of the widened street and the effect would be not to deprive him of the value of his property, but only that he would not obtain the additional value due to the proximity of his land to the improvement scheme.

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[1] (1874) L. R. 7 H. L. 243.

It was further argued on behalf of the respondent that, although the land of the respondent might be acquired by agreement, it was not subject to complusory acquisition. S. 69, under the head of "complusory acquisition," empowers the Board, with the previous sanction of the Local Government, to acquire land under the provisions of the Land Acquisition Act, 1894, for carrying out any of the purposes of the Act. It was said that to take land for the purpose of recoupment is not to take it in order to carry out any of the purposes of the Act, but only to provide a means whereby such purposes can be carried out. It is difficult to understand the distinction which is suggested. If the Board are authorised to acquire land affected in value by the execution of the scheme, in order to provide funds in ease of the public burden, the acquisition of such land is directly within the purposes of the Act and, the powers of compulsory acquisition are clearly applicable thereto. S. 81 of the Act confers on the Board wide powers for the holding or disposal of any land vested in them or acquired by them under the Act amply sufficient for dealing with any land acquired under S. 42 and not required for the actual execution of the street scheme.

In the result their Lordships are of opinion that the appeal should be allowed with costs here and below and they will humbly advise His Majesty accordingly.

Solicitors for Appellants: *Morgan Price & Co.,*

Solicitors for Respondent: *W. W. Box. & Co.,*

A. P. P.

PRIVY COUNCIL.

PRESENT:—LORD SHAW, LORD PHILLIMORE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

[On Appeal from the Court of the Judicial Commissioner, Oudh.]

Thakur Nageshar Baksh Singh ... ... *Appellant**

v.

Mussammat Ganesha ... ...*Respondent.*

Settlement records—Their value as evidence of title or possession—Settlement of Oudh after the Mutiny—Did the entries then made merely recognise existing rights or constitue a fresh root of title—Inferences from entries in settlement records as to partition or separation of interests—Generally of little value—Presumption against partition.

Given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint. That presumption is peculiarly strong in the case of the sons of one father.

It is not any part of the law of India that settlement records are by themselves conclusive evidence of the facts which they purport to record. They have merely to be considered with the other evidence. The broad question of partition of rights or separation of interests is not dealt with in such record, and the inference of such a transaction from entries therein may be weak or strong according to circumstances. A definition of shares in revenue and village papers is by itself very slight evidence of an actual separation in a Hindu family, and generally quite insufficient to overcome the presumption against partition.

Observations of Edge, *C. J.* in *Gajendar Singh* v. *Sardar Singh* [1], approved.

Lord Canning's Proclamation after the Mutiny swept away all prior titles in Oudh. But the Government officers conducting the settlements did not proceed upon the notion that prior rights were to go for nothing: and in most cases their proceedings were rather a recognition of those rignts than a fresh root of title.

Appeal from a decree of the Judicial Commissioner of Oudh, reversing a decree of the Subordinate Judge of Gonda.

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* Nov. 7-11 and 13 1919.

1. (1895) I. L. R. 18 All. 176.

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The suit here was brought to set a side asale deed executed in favour of the appellants'' predecessor. by three Hindu Pardahnashin ladies, Mussammats Basanta, Rani and Maharani. The relationships of the parties and the material facts are set out in their Lordships' judgment. The respondent Ganesha is daughter of Rani. It was concurrently found by the lower Courts that the sale deed was without consideration or legal necessity, and hence respondent would ordinarily be entitled to succeed, the grantors of the deed, all Hindu widows, being dead. But it was contended for the appellant that there had been a partition or separation of shares either between Sheo Dayal and Gokaran themselves or between their widows, and hence that respondent, who was not alleged to be Gokaran's heiress, had no title to anything but the share of Sheo Dayal or his widow, which was taken to be a half. The substantial question on this appeal was whether any such partition or separation had in fact taken place. As to this the Appellate Court found against appellante and accordingly decreed the suit as to the whole of the land in dispute. Hence the present appeal.

De Gruyther, K. C., and *G. S. Saunders*, for appellant, contended, in the first place, that the vendors under the sale deed impeached had absolute ownership and not merely a Hindu widow's estate. Secondly, the documents in the case and especially the Khewat and Wajib-ul-arz, show that Sheo Dayal and Gokaran were seperate in estate.

That the vendors were absolute owners appears from the settlement decree of December 6, 1869, which shows Basanta as owning 8 annas in her own right and Rani and Maharani the other 8 annas jointly. The effect of Lord Canning's proclamation of March 15, 1858, was to divest all landed property from the proprietors in Oudh: when a regrant was made to a proprietor the new title depends entirely on the terms of the regrant: *Nawab Malka Jan Sahiba* v. *Deputy Commissioner of Lucknow*[1] *Prince Mirza Jehan Kudi Bahadur* v. *Nawab Assur Bahu Begum*[2] and same case. *Prince Mirza Jehan Kadi Bahadur* v. *Nawab Badshoo Bahoo Sahib*[3] Oudh Sub-Settlement Act (XXVI of 1866), Sykes' Compendium, paras. 286, 386.

If Sheo Dayal took by survivorship from Gokaran, as contended for respondents, Basanta's name would not be in the decree at all, whereas she is shown as holding 8 annas: this is consistent only with all three having absolute estates. The Khewat and Wajib-ul-arz support this view and also prove there had been a separation of interests: Basanta holding half the village and Sheo Dayal's widows

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[1] (1879) L. R 6 I. A. 63

[3] (1885) L. R. 12 I. A. 124.

[2] (1878) L. R. 6 I. A. 76.

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the other half. "Khewat" is defined in Act XVII of 1876: vide also Oudh Circulars 20 of 1863 and 24 of 1864.

Dunne, K. C. and Dube, for respondent: The Judicial Commissioner's Court has rightly held that Sheo Dayal and Gokaran were joint. The same finding was come to thirty years ago with regard to the Harsinghpur village. Sheo Dayal took not by inheritance but by survivorship, and respondent is his successor. The settlement decree expressly reserves "the rights of the other shareholders". Upon its true construction it does not confer an absolute estate. As the Judicial Commissioners have pointed out, the reversioners had at the time of the settlement no right to claim possession: till the widows' estate came to an end it was impossible to say who they would be, "The decree did not profess to confer on the widows greater rights than they had before." The *khewat* merely records the supposed effect of the decree: it carries matters no further.

De Gruyther, K. C., in reply: A settlement decree in Oudh is a root of title and determines proprietary rights: it is not merely based upon possession, as is the case in other parts of India: *Muhammad Mumtaz Ali Khan* v. *Pertab Singh.* [1]

The Settlement Officer did not recognize Rani and Maharani as owners of the whole 16 annas: he included Basanta as being entitled to 8 annas: under the rules, no one who was not a co-sharer would be included as Lumbardar: Basanta's name being mentioned shows that she was deemed to be a co-sharer. He referred to Cursia's Land Revenue Manual pp. 107, 235; and Circular 1123 C of 1862 see Parliamentary Papers relating to Oudh, 1865.

Their Lordships' judgment was delivered (December 19, 1919) by

Lord Shaw.

Lord Shaw:—This is an appeal from a judgment and decree of date 8th August, 1916, of the Court of the Judicial Commisioner of Oudh, which reversed a judgment and decree dated the 23rd December, 1913, of the Subordinate Judge of Gonda.

In the suit which is brought the plaintiffs pray for a decree for possession of the village of Sonahra, Pargana Paharapur, Tahsil and District Gonda, by cancellation of a certain sale-deed thereof executed on the 30th December, 1871, in favour of Thakur Mirtunjai Bakhsh Singh, now represented by the appellant. The grantors of the deed were three Hindu pardanashin ladies, Mussammats Basanta, Rani and Maharani.

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[1] (1893) Oudh Select Cases. No. 233.

A pedigree is given in the papers, which gives the family descent from one Bishan Pershad. Bishan was the owner of *inter alia,* two villages, Harsinghpur and Sonahra. No question arises with regard to Harsinghpur in this appeal. It appears, however, that a question analogous to that now raised was settled in a suit relative to that village over thirty years ago, and was answered in a sense adverse to the present appellant. It was held in that suit that the sale-deed had not been granted for consideration or with legal necessity, and that Harsinghpur was part of a joint undivided family property with reference to which the deed was ineffective. Their Lordships have, however, considered the present appeal, which is confined to the case of Sonahra, on its own merits.

Bishan Pershad owned, as already mentioned, these two villages. The pedigree as flowing from him is as follows :—

Bishan Prasad (dead)

Raghubans (dead) — Jai Gobind (dead) — Parmeshar Das (dead)

Raghubans (dead): Debi Bakhsh
Debi Bakhsh: Sheo Dayal died 1865 married (1) Rani died 1908 (2) Maharani died 1888
Sheo Dayal and (1) Rani: Ganesha (Plaintiff No. 1 Respondent)
Ganesha: Kedar Nath (Plaintiff No. 2).

Jai Gobind (dead): Gokaran died 1858 married Musammat Basanta died 1885; Somant (dead)

Parmeshar Das (dead): Jawahar (dead)

The facts of the case and relative dates are stated in a judgment delivered by the Court of the Judicial Commissioner dated the 17th December, 1915 :—

"The village in question originally belonged to Santokhi, to whom it was granted under a Birt *patra* by Raja Dat Singh, the Taluqdar of the village, in 1128 Fasli. From Santokhi the property passed to his lineal male descendants, the last of whom were Gokaran,.........representing one branch of his line, and Sheo Dayal,.........representing another branch of his line. The summary settlement was made with Gokaran. Gokaran died some time in 1858, leaving a widow, Musammat Basanta. Sheo Dayal died in 1865, leaving two widows, Musammat Rani and Musammat Maharani, and a daughter by the former, named Musammat Ganesha. On the 30th December, 1871, Musammat Basanta, Musammat Rani and Musammat Maharani sold the village in dispute to the father of the defendant-respondent. Musammat Basanta died in 1885, Musammat Maharani in 1888, and Musammat

Rani in 1908. Mussammat Ganesha, the daughter of Sheo Dayal, is alive and one of the plaintiffs to the suit."

It is manifest that if the three ladies, grantors of the deed under challenge, were fully vested owners, the one of an 8-annas share and the other two of a 4-annas share each, of the village, they were in a position to grant a proper title. But of course on the accepted facts, such ownership in the ladies would be impossible.

Even although, however, they had possessed the village, not as complete owners, but as enjoying the same in shares as widows of former proprietors, and also enjoying, it may be, all the powers attaching to that status, it might also be that a valid sale could have been effected under the deed in question. The condition of such validity would, of course, be that the deed was for consideration and was granted by reason of legal necessity.

It is possible at once to disburden the case of much of the material which entered into the procedure of the Courts below on this last-mentioned issue. For it has been found, after a special remit by the Court of the Judicial Commissioner to the Court of the Subordinate Judge on that topic, that the deed challenged was granted without consideration and without legal necessity. There are concurrent findings to that effect. Were the deed, accordingly, a deed of the widows of deceased owners with no further rights in or over the village than they would have as widows, the challenge must prevail. To this the retort was made that the plaintiffs had not proved that they were reversioners to Gokaran, and as there had been (as the defendants alleged) a separation of shares the defendants must fail as to Gokaran's moiety. They alleged such separation. This raises a question fundamental to the case and anterior to the issues just mentioned. That question is one upon which very careful and exhaustive argument was presented to the Board. Was the village or was it not joint undivided family property at the date of sale. The appellant strongly contends that it was not. It must stand admitted that the village was ancestral property since the early portion of the eighteenth century. But it was maintained that a partition of this joint undivided family property was made. No deed expressly to that effect was executed. The argument, however, is that the facts of the case are sufficient to show that a definite

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separation of family interests took place, the shares being correctly stated in the Government returns and papers to be afterwards mentioned as an 8-annas share to Musammat Basanta, widow of Gokaran, who died in 1858, and a 4-annas share to each of Musammat Rani and Maharani, widows of Sheo Dayal, who died in 1865.

Upon this issue, whether it be named "partition," or whether it be named "separation of interests," it is important to ascertain at what date it is alleged that the transaction took place. Upon this subject the Board, notwithstanding repeated enquiries, has found itself unable to ascertain what is the attitude definitely adopted by the appellant. The difficulties are, of course, considerable. Apart from separation, the descent of the property would in ordinary course be, up till the year 1858, to Gokaran, Basanta's husband. When Gokaran died in 1858, the property in its entirety would then pass to Sheo, his nephew, the only other male representative, and Sheo died in 1865. There is nothing in the case to suggest that there was any transaction of the nature of partition butween Gokaran and Sheo. If however, there was no such partition, the ancestral property of this village became that of Sheo in ordinary course, and the whole right of Musammat Basanta therein was a right as Gokaran's widow to maintenance therefrom.

During this period, that is to say, when Sheo was proprietor it would be impossible to maintain that he executed any deeds of partition of this property; such partition would in short have been in the nature of a conveyance from himself, as owner in entirety, of a certain part of the property to another not in the line of his succession. There is no such evidence. If there had been, serious questions with regard to it might have been raised. Therefore the whole question is still further proposed to that period of time sebsequent to Sheo's death.

Sheo left two widows, and the fact cannot be disputed that in so far as light can be thrown upon the subject by the village records, Basanta did have in her enjoyment an 8-annas share, and Sheo's two widows did each have a 4-annas share of the enjoyment of this village. The real facts appear to be that the three ladies lived together, the dominating personality, if any, among them being naturally the much senior widow, Basanta.

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From these facts and specially from the records the appellant has stoutly argued that separation as a fact is proved. He forcibly founds upon the Settlement Decree obtained by the three widows, passed by the Settlement Assistant Commissioner of Gonda, and dated the 6th December, 1869. In this judgment that officer ordered that "a decree for superior proprietary rights in favour of Rani and Maharani, wives of Sheo Dayal, and Musammat Basanta, wife of Gokaran, be passed."

To this it is instantly answered, first, that to found upon that decree as either a root of title or as conclusively settling it, is to mistake the true nature of the decree itself; and secondly, that the decree not only does not deal with other rights in the property, but expressly reserves these other rights.

On this latter point of reservation there can be no question. It is contained *in gremio* of the decree. It is no doubt true that, as already mentioned, the decree is in name for superior proprietary rights in favour of the widows, but it is expressly declared that that decree should "be passed subject to the rights of the other shareholders." If it be correct, as alleged by the appellant, that the property had at that time been *de facto* separated into one 8-annas and two 4-annas shares, and that this decree of December, 1869, was a *de jure* recognition of that fact, then the entirety of the property was disposed of, and language of reservation or the mention of other shareholders, was hardly appropriate, but might be contended to be repugnant to the transaction which is pleaded.

In the opinion of their Lordships, the terms of this decree must be looked upon as a whole. When on the one hand it declares for superior proprietary rights in favour of the widows, and on the other that these are to be given subject to the rights of the other shareholders, it completely conserves such reversionary and other ownership rights as are inherent in the succession to a joint family property and it negatives the idea that partition or separation had been effectuated by law in such a manner as to extinguish other proprietary rights. In short, in the view of the Board, this decree is not equivalent to an affirmation of a partition or separation having taken place, but is entirely consistent with the existence of the property as joint and undivided, and therefore with no prejudice being effected to the right of the reversioner therein; who is represented by the respondent.

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But the decree of December, 1869, has a much more solid value by the testimony which it itself affords of what was the true nature of the property and what was the exact point in dispute in the competition for it. There were three separate claims to the property. One was by Partab Bali and others. Their claim was got rid of (the Commissioner remarking that it would certainly have failed) by a small payment. The second claimant was Rai Sadhan Lal, and after enquiry it was found that his interference with the village was regarded as unlawful, and his claim completely failed. He had been *muafi* holder and his right expired with the settlement. The third party to the proceeding was constituted by the three widows, and their right without any question is dealt with as a right of ancestral property. "To the satisfaction of the Court" they "have been proved to be the old zamindars." Then an examination of the title is made, and it is solemnly affirmed :—

> " Let it be known that on their behalf a *Birt Patra* Sanad bearing the seal of Raja Dat Singh, dated Jeth Sudi 2nd, 1128 Fasli, has been produced, which shows that the villages Sonahra and Harsinghpur were given by way of *Birt* to their common ancestor, Santokhi Avasthi, on Rs. 3,562. Its genuineness is proved...... And fourthly, it appears from the evidence on record that their ancestors always remained in possession within and beyond limitation ; and lastly, that both the Summary settlements were made with them. "

It thus appears that the property was treated as a *unum quid*, as ancestral, and as property to which, as an ancestral undivided property, the three widows vindicated their right. Upon the whole, this would have been sound evidence in any Court in favour of the continuance as and from that date of the property as joint and undivided. Their Lordships are of opinion that the Court of the Judicial Commissioner was right in so treating it.

The use of the term "superior proprietary rights" in the decree is, in their Lordships' opinion, to distinguish these from any under proprietary tenure and from any other inferior rights. In short, the possession by these ladies of the whole of the village among them was a broad fact which permitted the Government to make the entry in such a way as to have the full representation of the entirety of the village, with all the responsibilities attached to that representation, on the record. It is and has for many years under the decisions, been acknowledged that even one or two names may be inserted as representatives of a community of ownership, the details of which need not be minutely recorded.

But, furthermore, it must be remembered that the policy set forth in Lord Canning's Circular of the 28th January, 1859, in which it was stated that the rights conferred "on each holder of land are the free and incontestable grant from the paramount power and cannot be called into question by subordinate officers," and that the decision approved by the Chief Commissioner "is considered to be final and lasting," was greatly modified as regards zamindars and others not being taluqdars. In a letter issued on the 10th October 1859, which was afterwards appended to Act I of 1860, it was directed :—

> " As regards zamindars and others, not being taluqdars, with whom a summary settlement has been made, the orders conveyed in the Limitation Circular No. 31 of the 28th January, 1859, must not be strictly observed. Opportunity must be allowed at the next settlement to all disappointed claimants to bring forward their claims, and all such claims must be heard and disposed of in the usual manner."

The authoritative exposition of this subject was made in *Prince Mirza Zehan Kadr Bahadoor* v. *Nawab Badrhoo Bahoo Sahiba* [1] and the passage rightly founded upon in the Court below from the judgment of the Privy Council as delivered by Sir Arthur Hobhouse, is here repeated :—

> " The first observation on these proceedings is that the settlement courts were clearly enquiring to in the old titles, as they existed prior to the confiscation. It is true that the confiscation swept away all prior titles, though it may be doubted as Mr. Lincoln suggests, whether in 1868 that effect was realized to the minds of the Government Officers as it has become since the legal decisions, which establish it. At all events, when engaged in the work of pacifying and settling the country, the Government did not make an arbitrary, or wholly new, redistribution of property, or proceed upon the notion that prior rights were to go for nothing. In very many cases, probably in the great bulk of properties, they enquired who would be entitled if no confiscation had taken place, and effected settlements with those persons. Certainly that was the operation in which the three lower settlement courts were engaged with regard to Sohrawan when the case came before Sir Charles Wingfield as the highest Court of Appeal."

The Board does not think it necessary to enter upon much detail with reference to the enjoyment of the property in the time of Sheo Dayal, but they simply note that one document not without importance is printed applicable to the year 1861, that is to say, to the period after the death of Gokaran in 1858. It is dated the 31st December, 1861, and is a copy of a Rubkai of the Collectorate of Gonda issued by

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1. (1885) L. R. 12 I. A. 124.

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Captain Ross. The plaintiff in the proceedings was Sheo Daval himself; the defendant was Rai Sadhan Lal, already mentioned; and the judgment discloses as follows: that "on a perusal of the file it appears that Sheo Dayal Avasthi claims the lease (patta) of villages Sonahra and Harsinghpur on the basis of the zamindari right set up by him, and by right of inheritance from Gokaran, deceased, with whom the villages were settled in" 1857. The language used is not strictly accurate. Sheo could not claim by right of inheritance, but solely by right of survivorship. But otherwise the proceeding is instructive. It contains a warning to the *muafidar* to respect Sheo's rights, and there is not a trace of question that the property was treated as having been succeeded to in its entirety by Sheo as successor to Gokaran.

There are further elements in the case which need not be dwelt upon, as, for instance, a transaction by way of mortgage of the whole subject by the three widows themselves, in the year 1865. In this mortgage, dated the 9th November of that year, the property is referred to simply as the village Sonahra, and it is mortgaged as "our ancestral zamindari under a *Birt Patra* which has been in our possession and occupation without the co-partnership of anybody else from the time of our ancestors."

But the Board is unwilling to enter into further details and contents itself with expressing the view that no partition or separation of this joint ancestral property has been proved. It should be said, however, that in December, 1871, when the sale-deed now under challenge was executed, the very form of the deed is somewhat inconsistent with the transaction of shares of divided property. The village is sold as "the entire village." No reference is made to shares of 8 annas or 4-annas. There are circumstances of considerable suspicion attached to the deed, and it seems somewhat surprising that Mathura Nath, their general agent, should not have incorporated in the deed some reference to this transaction of partition (if true) of which so much has been made in the subsequent proceedings.

The state of the records was much pressed upon the Board by the Counsel for the appellant; that is, to say, the entries which were contained in the *wajib-ul-arz* and in the *khewat* of

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the village. Of the two the claim made with regard to the *khewat* is the stronger. Under the *wajib-ul-arz* entries it is pretty clear that the village was treated as a *unum quid*, even although the shares in the possession were stated as so many annas respectively.

The Court of the Judicial Commissioner, which is no doubt acquainted with entries in such records, does not attach to them the importance which the appellant seeks, and the Board is of opinion that in this it was right. The broad question of partition of rights or separation of interest is not, of course, dealt with in such entries, and the inference of such a transaction from such records may be weak or may be strong according to circumstances.

Records of that character take their place as part of the evidence in the case. They do no more. Their importance may vary with circumstances, and it is not any part of the Law of India that they are by themselves conclusive evidence of the facts which they purport to record. It may turn out that they are in accord with the general bulk of the evidence in the case; they may supply gaps in it; and they may, in short, form a not unimportant part of the testimony as to fact which is available. But to give them any higher weight than that might open the way for much injustice and afford temptation to the manipulation of records, or even of the materials for the first entry. Birdwood, J., in the Bombay case *Bhagoji* v. *Bapuji* 1 said as follows :—

> "At the re-hearing the lower Appellate Court should have its attention directed to the ruling in *Fatma* v. *Darya Saheb* (10 Bom. H. C. Rep., 187), in which it was held that the Collector's book is kept for purposes of revenue, not for purposes of title. The fact of a person's name being entered in the Collector's book as occupant of land does not necessarily of itself establish that person's title or defeat the title of any other person."

And the Board refer in particular to the judgment of Sir John Edge in *Gajendar Singh* v. *Sardar Singh* 2. In their opinion the statements of principle now to be quoted are of significance and are sound as applied not only to Allahabad but to other provinces in India as a whole. The main proposition is of course, widely familiar, namely, that " given a joint Hindu family, the presumption is until the contrary is proved, that

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1. (1888) I. L. R. 13 Bom. 75

2. (1896) I. L. R. 18 All. 176.

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the family continues joint. That presumption is peculiarly strong in the case of the sons of one father." The learned Judge further refers to "experience of the manner in which names of Hindus are entered not uncommonly in revenue and village papers in respect of shares;" and the Board sees no reason to differ from, but approves of, his pronouncement to the following effect :—

> "A definition of shares in revenue and village papers affords, by itself, but a very slight indication of an actual separation in a Hindu family, and certainly in no case that has ever come before us could we have regarded such a definition of shares standing alone as sufficient evidence upon which to find, contrary to the presumption in law as to jointure, that the family to which such definition referred had separated."

The Board is, on a review of the whole of this case, of opinion that the presumption against partition of this ancestral property has not been overcome and that the property accordingly remains joint, with the consequence that the appeal fails. As to the attempted case of adverse possession by Basanta, it is, in their Lordships' opinion, wholly without foundation. On the facts disclosed as to the actual enjoyment of the property and the conduct of all parties, including Basanta, with regard to it, no plea of adverse possession could be successfully put forward.

Their Lordships will humbly advise His Majesty that the appeal stand dismissed with costs.

Solicitors for Appellant :—*Barrow, Rogers and Nevill.*

Solicitors for Respondent :—*T. L. Wilson & Co.*

A. P. P.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE COUTTS TROTTER AND MR. JUSTICE KRISHNAN.

F. B.

Jainab Bibi Saheb v. Hyderally Saheb.

Jainab Bibi Saheb ... *Appellant.** (*1st Defendant*).

v.

Hyderally Saheb and others ... *Respondents.* (*Plaintiff and Defendants 2 to 4*).

Evidence—Admissibility—Prior suit between same parties—Evidence in—Admissibility by consent of, parties—Evidence Act, Ss. 33, 165—Effect.

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* A No. 3 of 1919. 25th March, 1920.

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The consent of the parties to a suit can make admissible the evidence given in a previous judicial proceeding between them even in a case in which the conditions prescribed by S. 33 of the Evidence Act do not exist.

Per *Krishnan, J.*—The provisions of S. 33 are intendedfor the benefit of a party to a suit and he may waive their benefit at any rate in a civil suit where no question of public policy is involved.

Quaere as to the position in a criminal trial.

Ponnusami Pillai v. *Singaram Pillai* [1] Overruled.

Appeal against the Decree of the Court of the Temporary Subordinate Judge of Masulipatam in Original Suit No. 88 of 1916.

The Court (Oldfield and Krishnan, JJ.,) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The greater part of the evidence in this case was taken in a previous judicial proceeding to which the same persons were parties and in which the same main issues were raised. That evidence was admitted by the lower Court by consent. The first point taken here is that it was inadmissible. Authority on the question is conflicting in *Ponnuswamy Pillay* v. *Singaram Pillay*[1] *Sri Rajah Prakasarayanim Garu* v. *Venkata Rao* [2] and *Krishna Reddy* v. *Sundara Reddy* [3]. We therefore refer to a Full Bench the question whether such evidence is admissible.

K. Srinivasa Aiyangar and *T. Ramachandra Rao,* for the Appellant,

P. Narayanamoorti, for the 1st repondent and *K. Ramamurti,* for the 2nd Respondent.

The Court expressed the following

Wallis, C. J.

Opinion :—*The Chief Justice.*—The decision in *Ponnusami Pillai* v. *Singaram Pillai* [1] that the consent of the parties to a suit cannot make admissible the evidence given in a previous judicial proceeding between the same parties where some of the issues were the same was based mainly on the provisions of Ss. 165 and 33 of the Indian Evidence Act. S. 165, which enables the presiding Judge to ask any questions "about any fact relevant or irrelevant" contains a proviso "that the judgment must be based on facts declared by this Act to be relevant and duly proved". The effect of this section merely is that, while

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[1] (1918) I. L. R. 41 M. 781.

[2] (1912) I. L. R. 38 Mad. 160.

[3] (1914) M. W. N. 931.

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the presiding Judge in the course of the trial may ask questions about irrelevant facts including under the scheme of the Act statements made to the witness by other parties or hearsay, he must base his judgment upon facts which are relevant to the issues and are duly proved. It does not throw any light on the question what facts should be considered to be duly proved. S. 33, which occurs under the heading "statements by persons who cannot be called as witnesses" provides that "evidence given by a witness in a judicial proceeding is relevant for the purpose of proving in a subsequent judicial proceeding the truth of the facts which it states" in the circumstances set out in the rest of the section. As pointed out in Amir Ali and Woodroffe's Commentaries the word "relevant" as used in the Act, is equivalent to "having probative force" and the effect of the section is to make the evidence admissible in the circumstances specified independently of the consent of the parties. Though differently worded this section has really much the same effect as Order 37, Rule 3 of the Rules of the Supreme Court which enables the Court to order evidence taken in another case to be read. This is in accordance with the old Chancery practice which is stated as follows in Daniel's Chancery Practice Ch. XII S. 2 (1) p. 515 "Evidence taken in another Court may be read in a cause on production of a copy of the pleadings if the two suits are between the same parties or their privies, and the issue is the same; and such depositions are admissible in evidence in the former cause," citing *Williams* v. *Williams* [1]. Such orders are only made in cases similar to those specified in S. 33, but if the Court could make such depositions admissible even without the consent of parties, the case for admitting them by consent is even stronger. Rules 1 and 18 of Order 37, which require the examination of the witnesses to be *viva voce* in open Court, except in cases where proof is to be made by affidavit or evidence taken on commission to be admitted, and provide that these two modes of proof shall not be adopted except in the cases specified, both contain a saving clause enabling it to be done in any case by the consent of parties. This is a recognition of the principle that such matters may properly be regulated by the consent of the parties.

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1. 12 W. R. 668.

The admission by consent of evidence taken in other cases raising the same issues is of daily occurrence in England and must now be taken to be the settled practice which is the law of the Court. If there is not much direct authority on the point, that would appear to be because it has never been seriously questioned. In *Conradi* v. *Conradi*.[1] a divorce suit in which a new trial had been ordered, the question arose whether according to the practice of that Court the Judge's notes of the deposition of a witness at the earlier trial who had since died could be read at the second trial except by consent. Lord Penzance, who had been a Common Law Judge, observed that he had known of its having been made a condition of granting a new trial that the Judge's notes of the previous trial should be admitted. No such order could have been made except on the footing that the consent of the parties could render the evidence admissible.

There is in my opinon no sufficient reason for holding that a different rule is applicable in India where the practice in cases such as the present is scarcely less well established than in England, and is of such obvious convenience that very strong grounds should be shown for holding it inadmissible. The Indian Evidence Act, it is true, contains no express recognition of the practice, but, neither, so far as I can see, is any such express recognition to be found in Taylor on Evidence. The Indian statute and the English treaties both confine themselves to stating the well established rules of evidence, and do not deal with the question how far the strict requirements of the established rules may be departed from by consent in cases such as this. Far from the practice being opposed to public policy, evidence not taken before the Judge actually deciding the case has been made admissible in India by statute, as pointed out by *Sundara Ayyar, J., in Sri Rajah Prakasa Rayanim Garu* v. *Venkata Rao* [2] in cases where a suit is transferred from one Court to another and where there is a change of Judge in the trying Court owing to death, transfer or other cause. In these circumstances the practice seems to be in accordance with the principle embodied in the maxim *Unusquisque potest re-nuntiare juri pro se introducto,*

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[1] P. and D. 515.

[2] (1912) I.L.R. 38 Mad 160.

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seeing that it is not only not opposed to public policy but entirely in accordance with it. The trend of the Indian decisions which are referred to by Sundara Ayyar, J., is also in its favour, and the judgment of Sir Lawrence Jenkins, C. J., in *Ramaya Bin Subaya* v. *Devappa Ganpaya* [1] is to the same effect. *Ponnuswami Pillai* v. *Singaram Pillai* [2] must be over ruled and the question answered in the affirmative.

Coutts, Trotter, J.

Coutts-Trotter, J.:—It is clear that in this country neither an omission by an advocate to object to giving of irrelevant and inadmissible evidence nor the failure of the tribunal to exclude it of its own motion will validate a decree based on material which the Evidence Act declares to be inherently and in substance irrelevant to the issue. A wholly different question arises, where objection is not as to the nature and quality of the evidence in itself but merely as to the mode of proof put forward. I agree that consent can cure what would otherwise he a defective method ot letting in evidence in its substance and contest relevant and germane to the issues; and that to hold otherwise would not only be contrary to the established practice both in England and in this country but would prohibit litigants from adopting a method leading to the saving of time and expense and in itself neither inconvenient nor unjust. I am of opinion, that *Sri Rajah Prakasarayanim Garu* v. *Venkata Rao* [3] was rightly decided and that *Ponnuswami Pillai* v. *Singaram Pillai* [2] is contiary both to principle and practice.

Krishnan, J.

Krishnan, J.:—This reference raises the question of the correctness of the ruling in *Ponnusawmy Pillay* v. *Singaram Pillay.* [4] The learned Judges who decided that case held on a constructions of Ss. 33 and 165 of the Indian Evidence Act that in spite of the consent of parties the evidence given by a witness in a former proceeding was not admissible in a later proceeding between the same parties unless the "conditions prescribed by S. 33 of the Indian Evidence Act were found by the trial Judge to exist." In arriving at this conclusion they expressly declined to follow an earlier ruling of this Court in *Sri Rajah Prakasarayanim Garu* v. *Venkata Rao* [3]. With all respect to the learned Judges it seems to me that their view cannot be supported.

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[1] (1905) I. L. R. 30 Bom. 109. [2] (1918) I. L. R. 41 Mad. 781

[3] (1912) I. L. R. 38 Mad 160.

As pointed out in *Krishna Reddy* v. *Sundara Reddy* [1] the question involved here is one of mode of proof of relevant facts rather than one of the relevancy of the facts themselves. The former depositions were sought to be admitted as proof of facts relevant to the present case spoken to by the witnesses then. The primary rule to prove relevant facts by the evidence of witnesses is to call them before the trial Judge and examine them *viva voce* in the manner stated in Chapter 10 of the Evidence Act. But that rule has several recognised exceptions such as the examination of witnesses on commission, or the use of affidavits as evidence, the use of evidence taken by one Judge by another as in cases where a suit is transferred from one Court to another or when there is a change of Judge in the trying Court. One of such exceptions recognised by law is the method of filing the record of evidence of a witness taken in a former Judicial proceeding. This is allowed by S. 33 of the Evidence Act subject, no doubt to certain restrictions and conditions. These limitations seem, from their nature to be intended to protect the opposing party from being prejudiced by such admission as it may interfere with his right of cross-examination and of testing the credibility of the witness. I quite agree that if such evidence is to be admitted against the opposition of a party the Judge should be satisfied that the conditions and restrictions imposed by S. 33 are fully complied with ; but I can see no difficulty in holding that a party may waive the benefit of those provisions which are intended for his benefit at any rate in a civil suit where no question of public policy is involved whatever the position may be in a criminal trial. A civil suit is a proceeding *inter parties* and as parties can by consent settle its final result by having a consent decree passed, there is no reason why they should not be permitted to consent to treat something as evidence of a relevant fact which it may not otherwise be ; and when the trial Judge has admitted and acted upon such evidence it is not only proper evidence but the parties ought not to be allowed to object to its admissibility in appeal.

This view is in accordance with rulings of our Court in *Angammal* v. *Aslami Sahib* [2] and *Krishna Reddi* v. *Sundara Reddi* [1] and it has also the high authority of Sir Lawrence Jenkins in its favour in *Ramaya Bin Subaya* v. *Devappa Ganpaya* [1]. That learned Judge says "parties, if so minded may ordinarily agree that evidence shall be taken in a particular way and it is common experience that parties do agree that evidence in one suit shall be treated as evidence in another. That is not a matter which can be said to affect the jurisdiction of the Court. It is merely that parties allow certain materials to be used as evidence which apart from their consent cannot be so used."

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[1] (1914) M. W. N. 931.

[2] (1918) I. L. R. 38 Mad. 710.

It is also in accordance with the established practice both here and in England and we should not lightly depart from such practice as it tends to the saving of time and expense. Again, where such evidence has been admitted and acted upon by the trying Judge without objection it is clear from *Lakshman Govind* v. *Amrit Gopal* [2] and the authorities cited in it that the Appellate Court should not allow any objection to be taken to the procedure.

The learned Judges in the 41 Madras Case consider that what they call "the stringent provisions" of S. 165 of the evidence Act, that is, the first proviso in it, prevent the views above stated from being taken. I agree with the learned Chief Justice that that section has really no bearing on the question before us.

The section is enacted to enable the presiding Judge to ask any question he pleases whether relevant or irrelevant and to order the production of any document or thing which he wishes to have. The provision relied on in 41 Madras is the proviso to that section; and as such it has no general application but merely prohibits the Judge from basing his judgment on the facts so obtained by him unless they are relevant and duly proved. It comes into operation only when the Judge has acted under the section.

I therefore agree that our answer to the reference must be in the affirmative and that the case in 41 Mad. 731 must be overruled.

A. S. V.

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[1] (1905) I. L. R. 30 Bom. 109.

[2] (1900) I. L. R. 24 Bom. 591.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH].

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE MR. JUSTICE OLDFIELD, AND MR. JUSTICE SESHAGIRI AIYAR.

V. M. Assan Mahomed Sahib .... *Petitioner.** (*Petitoner-Defendant*).

v.

M. E. Rahiman Sahib ... *Respondent.* (*Counter-petitioner-Plaintiff*).

F. B.
Assan Mahamed Sahib
v.
Rahiman Sahib.

Provincial Small Causes Court (Act IX of 1887,) S 17 proviso Requirements of—Whether mandatory or directory-Disposit of decree amount or furnishing the security before the period of limitation is sufficient compliance.

The provision as to the deposit of the decree amount or the giving of security in the proviso to S., 17 of the Provincial Small Causes Courts Act is sufficiently complied with, if the deposit is made or the security is given before the time-prescribed for such application in the Limitation Act has elapsed.

Jeun Muchi v. *Budhiram Muchi* 1 followed.

Per *The Chief Justice and Oldfield, J.* (*Seshagiri Aiyar J dissenting*), The proviso to S., 17 of the Act is a mandatory provision and not merely a directory rule.

Per *Seshagiri Aiyar, J.*:—The proviso to S., 17 is only a directory and not a mandatory rule.

The directory nature of similar provisions in the Indian and English enactments discussed.

Petition under S. 25 of Act IX of 1887 and S. 107 of the Government of India Act praying the High Court to revise the order dated 17th January 1919 of the Court of the Subordinate Judge of the Nilgiris, Ootacamund, in Civil Miscellaneous Petition No. 477 of 1918 in Small Cause Suit No. 949 of 1918.

The Court (Sadasiva Aiyar and Spencer, JJ.,) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The question that arises for our determination in this Civil Revision Petition is one upon which there has been considerable difference of opinion so far as this Court is concerned. It is whether the wording of S. 17 of the Provincial Small Cause Courts Act makes it imperative that a party seeking to set aside an *ex parte* decree of a Small Cause Court should deposit the decree amount in Court or give security at the time of presenting his application.

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* C. R. P. No. 1550 1919. 23rd February, 1920.

1. (1904) I. L. R. 32 Cal. 339.

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Assan Mahomed Sahib v Rahiman Sahib.

In *Ramasami* v. *Kurisu* [1] a case which went before a Full Bench on another point, the Divisional Bench that heard the Civil Revision Petition held that the provisions of this section were merely directory and not mandatory. In *Chaturvedula Suryanarayana* v. *Chaturvedula Ramamma* [2], Miller, J., considered this ruling but decided the case before him on another point, namely, that a deposit made after the hearing of the petition was in any case too late and rendered the application liable to be dismissed as barred by limitation.

In *Akula Achiah* v. *Lakshminarasimham,* [3] the authority of *Ramasami* v. *Kurisu,* [1] was followed with some hesitation as the learned Judges were unwilling to make a departure from what had been held to be the law in this Presidency by the practice prevailing for over 30 years.

On the other hand the Allahabad High Court has held in *Jagan Nath* v. *Chet Ram,* [4] and *Chhotey Lal* v. *Lakhmi Chand Magan Lal* [5] that the words of this section are mandatory.

We agree with this view. In our opinion the meaning of the section is clear. When it says that the applicant shall either deposit the amount due or give security * * * as the Court may direct, it does not mean that this shall be done only "if the court so directs", which is the interpretation that the petitioner's vakil wishes us to place on these words. The deposit or the tender of security must also be made "at the time of presenting the application." Those words cannot be treated as intended to be devoid of their natural meaning so as to leave it open to the applicant to make the deposit or tender the security at that time or at any other time.

We therefore refer to a Full Bench the question whether the directions in Section 17 of the Provincial Small Causes Courts Act as to the deposit of the decree amount or the giving of security at the time of presenting an application to set aside an *ex parte* decree are mandatory or not.

T. M. Krishnasawmy Iyer :—The provisions of S. 17 of Provincial Small Cause Courts Act are only directory. The

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1. (1890) I. L. R. 13 Mad. 178.
2. (1910) I. L. R 34 Mad. 88.
3. (1919) 37 M. L. J. 438.
4. (1906) I. L. R. 28 All. 470
5. (1916) I. L. R. 38 All. 425.

reference to the time of presenting the application only indicates that the obligation to make the deposit or furnish the security commences at that point of time. The words "as the Court may direct" governs both clauses of the alternative so that without the Court requiring which of these two things an applicant shall do, no obligation to do either of the things at all arises.

The section does not contemplate any previous application to the Court prior to the application to set aside the *ex parte* decree. But the duty is cast on the Court to require one of these two alternatives at the time of the presentation of the application 24 C. L. J. 446 S. 3 of Press Act, 1910 contains a similar provision and the Privy Council construed it as imposing a duty of the magistrate to first decide the amount of the security before the declarent is called upon to deposit the same. *In re Besant* [1].

The history of the section supports my contention. S. 21 of Act XI of 1865 distinctly provided that no new trial shall be granted unless the applicant shall deposit the decretal amount along with his notice of application. The omission of those words or similar words in the present S. 17 shows a change in the intention of the legislature to make the provision only directory and not mandatory. Maxwell 2nd Edn. 50; 27 Halsbury, p. 149. The *Albama case*: A. G. v. *Sillem*. Further the jurisdiction to set aside an *ex parte* decree is conferred upon the Small Cause Court by the Civil Procedure Code. The proviso to S. 17 only imposes an additional obligation upon the applicant. Therefore the principle of strict construction of a statute laying down conditions for the exercise of a jurisdiction newly created by that statute has no application. In matters of procedure the Courts have always leaned in favour of a liberal and lenient construction unless the contest forbids any such course 24 M. 364, at 369; 11 A. 304. Expeditious disposal was one of the objects sought to be secured by the constitution of the Small Causes Court and a provision intended to confer a remedy upon parties who may be prejudicially affected by any such disposal ought to be more favourably construed in favour of the applicant than otherwise. Therefore this construction advances the remedy and

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[1] (1919) 37 M. L. J 139. P. C.

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suppresses the mischief and sufficiently protects the interests of the creditor.

The result of this contention is that the Court would have power under S. 17 to take the security or to allow the deposit at any time before the final order is passed on the petition.

This has been the uniform practice that has throughout been observed in this presidency 13 M. 178; 34 M. 88; 39 M. 583; 37 M.L.J. 433 Courts are very loth to disturb such a practice based upon a decision as early as 1870 on a point of procedure. 40 Mad. 233 at 238. 240 (F. B.) 1907 A. C. 425 (429); 1919 A. C. 856 857.

Similar words have came for construction before Courts under other statutes. Pensions Act XXIII of 1871, S. 6. The Privy Council held that the word "shall" is only directory and that a certificate obtained subsequent to the institution of the suit would cure the defect. 8 C 422 (P.C.) 32 A 148 (P.C.) S 602 of C. P. C. of Act XIV of 1822 contained a direction that the security for cost of Privy Council appeals shall be deposited within six months. The Privy Council held in 10 C. 657 approving the (F.B.) ruling in 2 C. 272 (F.B.), that the word shall was only directory and that time could be extended. See also 14 M. 391 and the practice of all courts has been uniform on this point. Under S. 92 of the Civil Procedure Code the sanction required for the institution of a suit could be obtained later and the defect cured 10 M. 185 ; 23 M. 28 ; 45 Ch. D. 139 and C. R. P. 892 of 1918 (unreported).

S. 17 does not make the deposit or the security a part of the presentation of the petition. On the other hand the presentation of the application is considered as a distinct act and an obligation is imposed to be performed by the applicant at the time when the first act is done. The view taken in 32 Cal. 339 that if at the time the deposit is made the application is not barred by time the application may be prosecuted which is really no decision on this point. The Limitation Act provides a period of limitation for the application and not for deposits. Therefore, to introduce the consideration of the period of limitation for the application into the question as to whether the deposit should be made on the security furnished at the time of the presentation of the application is a confusion of thought. A deficient Court fee may be paid; but still an application or an appeal does not become any the less in accordance with law at the time when it was actually presented. The real question is not one of limitation or anything connected with it but whether the courts have the power to take the deposit or security at any time after the presentation of the application, and before the application is granted.

Decided cases in Calcutta Bombay and Allahabad are against this contention but contain no discussion of the point. The Punjab and Oudh Court have uniformly followed the Madras view in13 M. 178 and have held that the time for making the deposit or giving security can be extended at the discretion of the Court.

C. Madhavan Nair for respondent. The Section says that the applicant shall make the deposit or furnish the security at the time of presenting his application and the defaulting applicant cannot be heard to say that he can do it subsequently. The section is imperative as to the point of time when the application has to do one of two things.

The History of the Section is an argument in my favour. The old cumbrous language of Act XI of 1865 S. 21 has been re-enacted in the proviso to S. 17 of Act IX of 1887. It has always been held that where a statute re-enacts an earlier provision which has been judicially construed in one way courts should put the same construction upon the the statute. That is the construction the legislature must be deemed to have in mind when re-enacting this section.

There has been no uniform practice in Madras on the point; even if there is a practice it is clearly opposed to the plain and imperative language of the statute and ought not to be accepted 1915 A. C. 1100. The principle of *stare decisis* is not applied to perpetuate a clearly wrong construction of a statute 1919 A. C. 856.

The analogy of the Pentions Act and other Acts cannot be applied to the statute under consideration. The cases in 2 Cal.

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272; 10 Cal. 557, 8 Cal. 422 turn upon construction of special Acts.

Courts have gone only to the extent of relieving an applicant who makes the deposit or give security within the time limited for setting aside the *ex parte* decrees (32 Cal. 339) and no further.

The Court expressed the following

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Opinion, *The Chief Justice* :—The corresponding provision in the earlier Act XI of 1865 was enacted as a proviso to S. 21, which, after enacting that all decrees and orders of the Court should be final and making provision for setting aside *ex parte* decrees and also for granting new trials in other cases, expressly provided that no such new trial should be granted to a defendant "unless he shall with his notice of application deposit in Court the amount" etc. Under this section there was clearly no jurisdiction to grant a new trial unless the proviso had been complied with in terms. Under that Act the procedure in these Courts was governed by rules made by the High Court under Section 46, but by Section 5 of the Code of Civil Procedure of 1877 the sections of the Code set out in the second schedule were applied to Small Cause Courts, so far as applicable. The sections so applied included the sections dealing with applications to set aside *ex parte* decrees and applications for review, and it was therefore only natural that the proviso now in question should appear in the present act as a proviso to Section 17 which again expressly provided that Small Cause Courts should follow the procedure prescribed in the chapters and sections of the Code of Civil Procedure specified in the second schedule. This re-arrangement necessitated some alteration in the language of the proviso, but that alternation in my opinion affords no ground for attributing to the Legislature an intention to modify the clearly mandatory nature of the earlier enactment, more especially as the new proviso is expressed in terms which are *prima facie* mandatory and have been so construed by the other High Courts. There are no doubt some English decisions in which the Courts have found indications in the particular enactments that provisions in form mandatory were only intended to be

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directory, but having regard to the history of the section there is in my opinion no room for any such conclusion here. In *Ramasami* v. *Kurisu,*[1] Parker, J., no doubt stated that he was disposed to hold that S. 17 was merely directory and not mandatory and went on to observe:—"The Court did require the costs to be deposited before the review was heard, and this, I think, is the intention of the section."

With all respect this appears to me to be importing into the section a new mandatory provision not to be found there. It does not appear from the report in that case whether the time prescribed in the Limitation Act for making an application under S. 17 had expired when the costs were deposited. In *Jeun Muchi* v. *Budhiram Muchi,*[2] where the application was made without making a deposit or giving security, it was held by Brett and Mookerjee, JJ., that, if the requirements of the section were complied with within the period prescribed for such applications in the Limitation Act, it might be treated as sufficient as no objection could have been taken if a fresh application had been presented when security was deposited. I think that this interpretation of the requirements of the section may well be followed, having regard to the practice which has prevailed in this Presidency, and would answer accordingly that the provision in question is mandatory, but is sufficiently complied with by satisfying the requirements of the section before the time prescribed for such applications in the Limitation Act has elapsed.

Oldfield, J.

Oldfield, J:—I entirely agree and add only that the interpretation we are adopting is consistent with the object of the Provincial Small Cause Courts Act, the provision of a simple fixed procedure for the cheap and expeditious disposal of petty claims.

Seshagiri Aiyar, J.

Seshagiri Aiyar, J.:—After the very full discussion which this case has received, I am confirmed in the view I took in *Akula Achiah* v. *Lakshmi Narasimham*[3] that there is no necessity for bringing our decision into line with the decisions of the other High Courts, except with I. L. R. 32 Cal. 339.

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[1] (1890) I. L. R. 13 Mad. 178, [2] (1904) I. L. R. 32 Cal. 339,

[3] (1919) 37 M. L. J. 488.

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On the question whether the language of S. 17 of the Provincial Small Cause Courts Act is only directory, there can be difference of opinion. The position is this. Before the enactment of Act IX of 1887, the procedure for the trial of Small Cause Suits and the procedure for the trial of regular suits were regulated by distinct legislative enactments. By the Madras Civil Courts Act III of 1873, S. 28, power was conferred upon the Local Government to invest District Munsifs and Subordinate Judges with Small Cause Court jurisdiction in regard to suits of a particular description. My impression is, that until the enactment of this provision, there were separate Small Cause Courts in defined centres, and the regular tribunals of the presidency were not invested with small cause powers. Then came the Civil Procedure Code of 1877. It was intended to regulate the procedure not only in the regular Courts but also in the Small Cause Courts. The Civil Procedure Code of 1882 recognised this principle, and also provided for the repeal of some of the provisions of the Small Cause Courts Act of 1865. When the present Small Cause Courts Act was re-enacted, provisions were introduced into it which while confirming the right of a small cause suitor to have his case tried according to the procedure precribed in the Civil Procedure Code, imposed limitations upon the exercise of some of the powers. S. 17 is an instance of this kind. In granting applications for setting aside *ex parte* decrees, the Small Cause Courts Act, S. 17, imposes a limitation upon the right of the suitor. Whereas, under the ordinary law, what the Courts have to be satisfied is that the party has not been duly served and that he had no opportunity of defending the suit, under the Small Cause Courts Act, in addition to satisfying these requirements. The defendant is required to deposit the amount of the decree. Therefore S. 17 should be read not as conferring a new jurisdiction subject to certain conditions, but, as limiting the exercise of jurisdiction by imposing conditions. This aspect of the history of legislation is essential for finding out whether S. 17 is directory or mandatory. Mr. Krishnaswamy Ayyar referred to S. 46 of the Small Cause Courts Act of 1865 and drew our attention to the fact that the language in the present Small Cause

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Courts Act is materially diffierent. I think there is force in this contention. The language of S. 17 suggests *ex facie* that the deposit of the decree amount should precede the application for setting aside the *ex parte* decree; but there are no words in the section that, if the deposit is not made, the application should not be received. That seems to be one of the criteria for construing a statutory provision to be mandatory; I do not say that that is the sole criterion. This view gathers strength from the decision of the Judicial Committee to which Mr. Krishnaswami Ayyar drew our attention, namely, *Butjore and Bhawani Pershad* v. *Bhagana*[1]. Their Lordships accepted the view taken *In the matter of the petitions of Soorj Mukhi Koer*[2], that the absence of a provision for the dismissal of a suit or application for failure to comply with a condition is a circumstance tending to show that the provision is permissive and not mandatory.

Even more significant is the decision of the Judicial Committee under the Pensions Act in *Mahammad Azmat Ali Khan* v. *Lalli Begum*[3].

In that Act, Ss. 4 and 6 read together make the institution of a suit in the Civil Courts dependent upon the production of a certificate from the Collector; and yet the Judicial Committee held that the production of a certificate during the course of the trial would be sufficient, thereby indicating that the sections are only directory. This view has been followed in Madras and other High Courts. See *Bepin*, v. *Abdul*[4], *Ganpat Rao* v. *Anant Rao*[5] and *Ganpat Rao* v. *Anant Rao*[6].

A third class of cases was referred to by me in my judgment in *Akula Achiah* v. *Lakshmi Narasimham*[7]. In *Ramayyangar* v. *Krishnayyangar*[8] and *Srinivasa Chariar* v. *Raghava Chariar*[9], it was held that S. 92 of the Civil Procedure Code which on a plain reading of it, indicates that the sanction of the Collector or the Advocate-General is a condition precedent to the institution of a suit, was satisfied by production of the sanction during the the course of the suit. I cannot say that the language of S. 17 of the Small Cause Courts Act is more imperative than Ss. 4 and 6 of the Pensions Act, or S. 92 of the Code of Civil Procedure. Therefore the principal which underlies the decisions in these latter acts are equally applicable to the construction of S. 17 of the Small Cause Courts Act.

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[1] (1883) I. L. R. 10 Cal. 557.

[2] (1877) I. L. R. 2 Cal. 272

[3] (1881) I. L. R. 8 Cal. 422.

[4] 24 Cal L. J. 446.

[5] (1905) I. L. R. 28 All. 104.

[6] (1909) I. L. R. 32 All. 148.

[7] (1919) 37 M. L. J. 483.

[8] (1886) I. L. R. 10 Mad. 185.

[9] (1899) I. L. R. 23 Mad. 28=7 M. L. J. 281.

In Maxwell on the interpretation of Statutes, it is stated in one place that the conditions relating to the giving of recognizances or to the trials in suits should ordinarily be regarded as mandatory. But a reference to the decision in *Rendall* v. *Blair*[1], will show that this statement is subject to many exceptions. In that case, the question was that whether if the consent of the Charity Commissioners was not obtained prior to the institution of an action, the action failed. Justice Kay, in the first Court held that it was a fatal objection. The learned Judge says, "Another objection is this : if I allow the action to stand over in order that leave may be obtained the writ, which was issued more than a year ago, must be treated as a writ issued *nen pro tune* and amendment must be allowed to the effect that the action was commenced after that leave obtained. I think that would be wrong. It would, I think, be entirely against the object and purpose of this section to allow the action to stand over for leave to be obtained" In Appeal, all the Lord Justices agreed that time should be given for obtaining the consent. Lord Justice Bowen said "whether, supposing the consent of the Commissioner was necessary, it would be right to dismiss the action altogether.. ....It does not seem to me that the proper course, if an action appears to the learned Judge at the hearing to be an action which falls within Section 17, would be to dismiss it altogether; on the contrary, I think you ought to allow it to stand over to see if the consent of the commissioners can be obtained." Then the learned Judge examines the language of the statute which is in these terms :—" Before any suit, petition, or other proceeding for obtaining any relief etc., relating to any charity, shall be commenced, presented or taken, there shall be trans-

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[1] (1890) L. R. 45 Ch. D. 139.

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mitted notice in writing to the Board......and the said Board, if upon a consideration of the circumstances they think fit, may, be an order or certificate direct any suit, petition or proceeding be next presented etc., ...and save as herein otherwise provided no suit, petition or other proceeding shall be entertained or proceeded with by the Court except upon and in conformity with the order or certificate of the said Board." On this language Bowen Lord Justice says, "This section is not framed in the way in which sections are framed when it is intended that some preliminary steps should be taken before the action is maintainable at all. On the contrary, both from the way in which it is framed, from the omission of the usual words, and also from the presence of words which seem to me to indicate that the absence of the consent of the Commissioners is only a bar to the Courts dealing with the action, and not a bar to the original institution of the suit." This decision in my opinion, which was concurred in on this point by Lord Justices Fry and Cotton, furnishes a clue for the construction of the section we are dealing with. I am not therefore prepared to say that the section is mandatory.

However that may be, in *Jeun Muchi* v. *Bhudhiram Muchi* [1] it is laid down that even though the original application may not be accompanied by a deposit once the application is on record, a deposit subsequently received within the time limited by law, would validate the application. This seems to be a very salutary rule. The later deposit would attract to itself the earlier application, and the application itself may be regarded as having been made on the date of the deposit. While this view would still make it permissible to the suitor to come into Court with an application unaccompanied by a deposit, it would also compel him to pay the money within the time limited by law. As against this view, there is the answer suggested by Mr. Krishnaswami Ayyar that, whenever a deposit is made before the conclusion of the trial, it should date back to the date of the original application. In support of this view, there is the analogy of the practice in this and the other Courts by which deficient Court fees paid subsequent to the date of filing of the appeal and the filing of

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[1] (1904) I. L. R. 32 Cal. 339.

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necessary papers which did not accompany the memorandum of appeal have been regarded as enabling the party to claim that the additional payment and the later production of documents should date back to the presentation of the appeal. In such cases the office fixes a time, within which the deficiency or the omission should be set right. If this is done, the delay is excused in the Admission Court.

My answer to the question is that the provision of Section 17 of the Small Cause Courts Act will be complied with, if the deposit required by that section is made within the period of limitation, although it did not accompany the application for setting aside the *ex parte* decree.

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An award to be enforceable in law, must be the award of all the arbitrators without difference.

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1st defendant, who along with the 2nd defendant and one N. formed a joint Hindu family, sold his share in the family property to a person who instituted a suit against all of them for the recovery of the share purchased by him. The matters in dispute in that suit were referred to an arbitration and an award was given in 1900 which, besides directing that the purchaser was to be put in possession of the share of the 1st defendant, provided that the second defendant was himself to bear all the debts alleged to have been incurred by him for family purposes and that the other defendants were to have nothing to do with those debts. A decree was passed upon the award in regard to the purchaser's claim, the rest of the award being simply recorded. The purchaser obtained possession of the share decreed to him and sold it to plaintiff in 1901, who in his turn, sold it to one V. in 1902. Meanwhile in 1901. One K. instituted a suit upon a mortgage bond alleged to have been executed in his favour by the 2nd defendant for a family debt, obtained a decree, and purchased the mortgaged property in execution. Subsequently, he instituted against the 2nd defendant and V. a suit for the delivery of the one-third share of his mortgagor D. obtained a decree in 1909, and obtained possession in April 1911 from V. Thereupon V sued the plaintiff for damages for breach of covenant, obtained a decree, and recovered damages from plaintiff in 1915. In a suit brought in 1916 by plaintiff against, *inter alia*, the 2nd defendant for damages for breach of the obligation imposed upon him by the award and for damages caused to the plaintiff by being obliged to compensate V.

Held. (1) there was a cause of action to the plaintiff against the 2nd defendant;

(2) the covenant in the award by the 2nd defendant was in the nature of an indemnity clause, the plaintiff became entitled to sue for reparation only in 1915 when he actually suffered damages, and the suit brought within 3 years from that date was not barred under Art 83 of the Limitation Act.

(3) the plaintiff was entitled to recover by way of damages not only the amount of debt and the interest thereon which the 2nd defendant had undertaken to pay but also the costs of the suit brought by V. against himself.

The award was binding on the parties to the reference as if it were a decree of court the second defendant had submitted himself to the covenant therein referred to above and that covenant enured to the benefit not only of the 1st defendant but of all persons claiming under him.

Seetamma v. Narayanamurthi, (Seshagiri Aiyar and Moore, J.J.) 470

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Attachment before Judgment—Effect—*Subsequent sale of attached property in execution of another decree—Subsequent application by person who attached before judgment for sale of the property in execution—Application by prior execution purchaser for dismissal of application—Maintainability.*

The appellant and the respondent attached the property of the same person before judgment in their respective suits against him. Both obtained decrees for money one in the court of the District Munsif of Tanjore and the other of Valangiman and both applied in the Court of the District Munsif of Valangiman for execution of their respective decrees. The first application of the Respondent was, however, dismissed, whilst the appellant's application resulted in a court sale in which he purchased the attached property. When the respondent again applied for a sale of the same property in execution of his decree, the appellant applied in that proceeding for an order dismissing the respondent's application on the ground that he appellant had become owner of the property.

Held, that the ownership of the property passed to the appellant from the moment that the sale was knocked down to him and the judgment-debtor retained no interest in it which could be attached or sold; that, as representative of the judgment-debtor, appellant was competent to make the application he did, and that respondent should not be permitted to proceed to the sale of the property unless or until the sale to the appellant was set aside by an order or decree of Court.

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Two of the agraharamdars sued the Receiver of the Nidadavole estate and the Zemindar for a declaration that the Kattubadi was only 500, joining the other agraharamdars as defendants. The suit was decreed by the first Court; but its decree was, on appeal by the Receiver, reversed by the District Court; and the decree of the District Court, was, on second appeal by plaintiffs, confirmed by the High Court, Pending the appeal to the District Court. A, one of the agraharamdar defendants died, but her representatives were not brought on the record in that Court nor were they made parties in the Second Appeal. In a subsequent suit between the Zemindar as plaintiff and the agraharamdars as defendants (the 10th defendant being the representative of A), as to the amount of the Kattubadi payable to plaintiff, *held* that by virtue of Explanation VI of S. 11 of the Code of Civil Procedure, the amount of the Kattubadi was *res judicata* against the 10th defendant by reason of the decree in the Second appeal in the prior suit.

Per *The Chief Justice*:—The Courts should hesitate to hold that any litigation had been *bonafide* within the meaning of Expl. VI of S. 11 in which there had been a substantial departure from the accepted rules as to the joinder of parties as for instance by suing without the leave of the Court in a case properly falling under O 1 R. 8.

The failure of the plaintiffs in the prior suit to implead the legal representatives of A in the Second appeal could not, in the circumstances of the case, be said to constitute such a want of *bona fides* as to render the Explanation inapplicable.

Scope and applicability of the Explanation considered.

Per *Spencer, J.*: A suit instituted for settling the amount of Kattubadi due to the Receiver of an estate upon an agraharam is one in which all the agraharamdars are necessarily interested and the decision therein is, if the litigation is conducted *bona fide*, binding on all the agraharamdars by virtue of Expl. VI of S. 11. Cases in which a party is represented at one stage of the suit and afterwards ceases to be represented owing to a failure to bring his legal representatives on record are not exceptions to the rule laid down by the Explanation.

Madabhushi Gopala charyulu v. *Emmani Subbanna.* (*Wallis. C.J. and Spencer J.*) 493

————**S. 47**—*Appeal, maintainability of—Parties and representatives—Simple-money decree—Mortgage decree—Purchasers in execution—Position of—Contest between rival purchasers in execution of decrees against same judgment-debtor—Decision, if appealable.*

The properties in dispute belonged to P. M obtained a money decree against P. in O. S. 733 of 1915, attached the properties in execution on 21-6-1916 and purchased them himself on 27-11-1916. Possession of the properties was delivered to M. on 12-2-1917 and he sold the properties to the petitioner on 28-8-1917. After the attachment in execution of M's decree, one V sued on a mortgage executed by P. of the properties in dispute. V obtained a preliminary decree on 25-9-1916 and a final decree on 11-7-1917. The properties were sold in execution of the mortgage-decree and three items were purchased by V. himself and the remainder by a stranger. The sale was confirmed on 21-1-1918. The purchasers in execution of the mortgage-decree were obstructed in obtaining possession by the petitioner and the Court made an order against the petitioner removing his obstruction. The petitioner preferred an appeal to the High Court. On objection being taken to the maintainability of the appeal,

Held by the full Bench that the question was one relating to execution and arising between the parties to the suit and their representatives within the meaning of S. 47 of the C. P. Code and that an appeal lay against the order.

Cases on the subject discussed.

Per *Abdur Rahim, O. C. J.*:—A person who has bought the property of the defendant in a suit since the institution of that suit, whether at a court auction held in execution of a money-decree passed in another suit, or by private purchase, is entitled and bound to have any question relating to the execution, discharge or satisfaction of the decree decided under S. 47 C. P. C. by the Court executing the decree when his interest is affected either by the decree itself or by the sale held in execution of that decree and the same rule applies to a purchaser of the property under such sale whether he is the decree-holder himself or a stranger. Whether the purchaser in the one case or the auction-purchaser in the other is to be regarded as the representative of the judgment-debtor or the decree holder depends on the nature of the question raised and who the contesting party is.

Per *Oldfield, J.*: The purchaser in execution of a money-decree is ordinarily the representative of the judgment-debtor. A purchaser from a decree-holder purchaser under a money-decree is the representative of the judgment-debtor for the purpose of enquiry into a question relating to the execution of a distinct decree affecting the same property.

Per *Seshagiri Iyer, J.*:—Where the equity of redemption is purchased under a money-decree, in matters relating to the execution of the mortgage—decree the auction-purchaser under the money-decree is the representative of the judgment-debtor in the mortgage-decree.

An auction-purchaser in execution of a money-decree is not the representative of the decree holder.

If the points for decision in an application before the executing court relate to the rival rights of the decree-holder and the judgment-debtor and also relate to the execution, discharge or satisfaction of the decree it should be dealt with in execution and not by separate suit. The right of appeal and second appeal will be governed by the same rules as affect applications under S 47.

Veyindramuthu Pillai v. *Maya Nadan.* (*Abdur Rahim, O. C. J., Oldfield and Seshagiri Aiyar J. J.*) 32 (F. B.)

————S. 73—*Rateable distribution—Rival applicants—Suit for declaration that decree of rival decree-holder is fraudulent and collusive—Suit, if maintainable before actual distribution of assets—Decree, setting aside—*

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Grounds on which, one decree-holder can impeach decree of rival decree-holder—Absence of consideration, not a sufficient ground.

Where several creditors have obtained decrees against the same debtor and all of them claim rateable distribution of his assets, it is not open to one or some of the creditors, to impeach the decree of a rival creditor except on the ground of fraud or collusion between the debtor and the creditor in the obtaining of the decree. The mere fact that the rival creditor obtained an *ex-parte* decree against the debtor on perjured evidence, would not enable the other creditors to impeach the decree collaterally. The decree is conclusive evidence of the legal relationship of debtor and creditor and of the amount of the debt, not only as between the parties to it, but also as against the other creditors of the judgment debtor. *Srinivasa Aiyangar* v. *Srinivasa Aiyangar* 33 *M.* 483, *Suppa Bhattar* v. *Suppa Sokkayya Bhattar* 29 M. L. J. 558 *Kadirvelu Nainar v. Kuppuswami Naicker* 31 M 748 Relied on.

Before the assets are actually distributed among the several applicants for rateable distribution, it is open to a decree-holder to bring a suit for a declaration that the decree of a rival decree-holder against the common judgment-debtor is fraudulent and collusive and, for an injunction restraining the rival decree-holder from obtaining a rateable distribution of the assets. The plaintiff's remedy is not confined to a suit under S. 73 cl. (2) of the C. P. Code for refund of the assets after distribution.

Parasurama Pattar v. *Veeraraghava Pattar* 7 M. L. J. 277 Dist. *M. R. Venkatrama Aiyar v. The South Indian Bank Limited. (Sadasiva Aiyar and Burn J. J.)* 108

———S. 92—*Suit under—Suit bad for want of requisite interest on the part of one of plaintiffs—Subsequent addition of other persons having requisite interest and obtaining sanction for very same suit—Effect—Maintainability of suit.*

Where in a suit instituted under S. 92 C.P. C., one of the plaintiffs was found to have no interest such as that required by the section and thereupon two other men who had the requisite interest applied to the Collector and obtained sanction instituted the same suit and were then added as 3rd and 4th plaintiffs, *held* that the suit was not liable to be dismissed on the ground that it was bad as laid and that the requirements of S. 92 were not satisfied by adding 3rd and 4th plaintiffs in the same suit.

Seshadri Reddi v *Subramania Aiyar.* (*Abdur Rahim and Phillips J.J.*) 504

———**S. 92—Or. 1, R. 10**—*Scheme suit—Addition of plaintiff—Power of court—Suit by worshippers with consent of Advocate-General—Addition of Advocate-General as plaintiff—Maintainability of suit by Advocate-General and worshippers obtaining his consent.*

In a suit for the protection of a trust under S. 92 C. P. C. the most important question to be settled are those which relate to the administration of the trust and the court has power under Or. 1 R. 10 to add parties for the effectual adjudication of those questions.

C. P. Code—*Contd.* PAGE.

The words "as between the parties to the suit" ought not to be read after the words "questions involved in the suit in" Or. 1 R. 10.

Under S. 92 a suit may be brought by the Advocate-General himself or by two worshippers to whom he has given his consent in writing to sue, or by the Advocate General in conjunction with those persons. The right of each to sue in his own name is not exclusive of the right of the other.

Parameswaran Munpee v. *Narayanan Namdudri* 40 M. 110 Referred to. *Rama Aiyangar* v. *Krishna Aiyangar*, 10 M. 185 followed.

Darves Hari Mahomed v. *Jainuddin* 30 B. 603 dissented from *Ambavalana Pandara Sannadhi v. The Advocate General of Madras.* (*Spencer and Krishna JJ.*) ... 201

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———**S. 145**—*Third party furnishing security on behalf of the judgment-debtor, whether a party to suit by surety to cancel the security bond on the ground of fraud—Whether maintainable—Scope and effect of S.* 145.

A third party who has given security on behalf of a judgment-debtor for the due performance of a decree has not an independent right of application under S. 47 of the Code of Civil Procedure and cannot therefore apply to the executing court to cancel the security bond on the ground that it was obtained by fraud. His remedy is only by way of suit.

The effect of S. 145 of the Code of Civil Procedure is that the surety may be made a party to the execution proceedings against the principal debtor and an order against the surety is in effect a decree upon his separate contract against him for the payment of money.

The surety is not a party to the suit or to the decree made therein nor does he become a party to the execution proceedings until application is made for an order against him. S. 145 only makes him a party for a limited purpose, namely, for appeal.

Ramanathan Pillai v *Doraiswámi Ayyangar.* (*Bakewell and Moore J.J.*) 65

———**S. 151 and O 44 R. 1**—*Appellate Court—Inherent power to allow appeal to be continued in* forma pauperis—*Court's discretion.*

Assuming that an appellate court has *inherent* power to allow an appeal presented in the ordinary form to be continued in *forma pauperis*, the court's discretion should be exercised subject to the conditions specified in the proviso to O. 44 R. 1 of the Code of Civil Procedure.

Nirmul Chandra Mookerjee v. *Doyal Nath Bhattacharjee* 2 Cal. 130. *Revji Patil* v. *Shaharam* 8 Bom. 615. *Thompson* v. *The Calcutta Tramway Co.* 20. C. 319. Referred to.

Solayappa Chetty v *Lakshmanan Chetty.* (*Sadasiva Aiyar and Burn JJ.*) 146

———**O. 9 R. 13 and O. 47 Rr. 1 and 7**—*Exparte decree—Application for review—Omission to apply under O. 9. R. 13—Effect of—Time taken in obtaining copies—Deduction of—Appeal against order granting review—Grounds for.*

C. P. Code—*Contd.* PAGE.

It is open to a party to apply for review of an *ex parte* judgment and decree on any of the grounds specified in O. 47 R. 1 of the C. P. Code. His omission to apply under O. 9. R. 13 of the C. P. Code to set aside the *ex parte* decree is no bar to the maintainability of the application for review.

Under S. 12 (2) of the Limitation Act the time spent in obtaining a copy of the judgment sought to be reviewed can be deducted in computing the period of limitation prescribed by art. 173.

An order granting a review is open to appeal only on the grounds specified in O. 47. R. 7 (1) of the C. P. Code.

Chockkalingam Chetty v. *Lakshmanan Chetty.) Spencer and Krishnan, J. J.)* ... 224

———**O. 21 R. 20**—*Auction-purchaser—Right to apply to set aside the execution sale.*

An auction purchaser at an execution sale is a person "Whose interest are affected by the sale" within the meaning of O 21 R. 90 of the C. P. and he can apply to set aside the sale on any of the grounds specified in that rule.

Gopalakrishnayya v. *Sanjeeva Reddi. (Spencer and Bakewell. JJ.)* 228

———**O. 22 R. 9** *Abatement of suit. Effect of, on the right of parties —Judgment inter parties when cannot be questioned by a third person.*

When a suit has abated and the abatement has not been set aside the defendant is entitled, as long as he continues in possession of the suit property, to plead against the plaintiff and those claiming under him that the order of abatement is conclusive of the right to the property. In such a case the order of abatement operates as a judgment in favour of the defendant and no distinction can be made between a judgment obtained on the merits and a judgment obtained on a failure to prosecute the suit.

When a judgment has established the right to any property between two parties, it is not open to a third person to set up the right of that party whose title has been found against as against the successful party. Such cases form an exception to the Rule of *res inter alias acta.*

R brought a suit against her father A and his alienee for recovery of certain properties on the ground that the sale deed in the name of her father was benami for her. Pending the suit R. died and an order was made declaring that the suit abated. An application for setting aside the abatement by a creditor was also dismissed. The creditor then obtained a decree against the assets of R. in the hands of the defendants and attached the properties which were the subject-matter of the former suit. On a claim petition by A that the properties belonged to him exclusively and that his daughter R. had no interest in them held that the claimant was entitled to succeed.

Rahim Unnissa v. *Srinivasa Aiyangar. (Seshagiri Aiyar and Moore J. J.)* ... 266

———**Or. 34 R. 4 and 6**—Decree under—Conditional decree—Passing of —Validity. ... 203

———**O. 34 R. 6**—*Mortgage—Personal decree—Application for—Maintainability—Condition—Omission to proceed against portion of mortgage property—Effect.*

C. P. Code—*Contd.* PAGE.

Where a mortgagee of 6 items of property sued upon the mortgage relinquishing without any reason whatever his claim to 4 items, obtained a decree for sale of only the remaining items, and, after the sale thereof, applied for a personal decree under Or. 34 R. 6 C. P. C., *held* that he was not entitled to a personal decree in as much as he had not exhausted his remedy in respect of all the items of the mortgaged property.

Per Seshagiri Aiyar, J.—The personal remedy should be enforced only when there is a deficiency after the sale of all the mortgaged property available for sale.

Arunachala Velan v. *Venkatarama Aiyar.* (*Oldfield and Seshagiri Aiyar, JJ.*) 93

Company—*Register of mortgages—Charge in favour of a Secretary—Omission to register—Its effect—Indian Companies Act,* 1882 (*Act VI of* 1882) *S.* 68, *explanation—The Companies Act,* 1861 (25 X 26 *Vict. C.* 89), *S.* 42—*Practice—Time for appeal barred but question entertained by Appellate Court—Implied extension of time for appeal—Construction of Acts—Proceedings in Council prior to enactment not admissible.*

An officer of a limited Company cannot avail himself of a mortgage or charge in his favour, which has not been registered in accordance with S. 68 of the Indian Companies Act, 1862.

The Lower Court decided that the want of registration did not prevent the enforcement of the charge in this case. The debenture-holders, although bound by the judgment, did not appeal. More than a year after the time for appeal had elapsed, when it was sought to enforce the charge, the debenture-holders, on appeal to the High Court, were allowed by that Court to raise the point of non-registration.

Held, that the High Court had by implication enlarged the time for appeal.

When the consideration of an Act is in question, no statement made on the introduction of the measure or its discussion can be looked at as affording any guidance as to the meaning of the words.

The words " as such" in the Explanation to S, 66 of Act VI of 1882 are superfluous.

Krishna Ayyangar v. *Nallaperumal Pillai* (Viscount Finlay) (P. C.) ... 444

Companies Act, (**1861**) (**25 and 26 Vict. C. 89**)—**S. 42**—Practice—Appeal—Time for, barred—Implied extension of time to appeal—What amounts to 444

———(1882) S. 68 Explanation. "as such"—Meaning—Company—Charge in favour of Secretary—Validity—Omission to register—Effect. 444

Contracts by minors—*Void and not merely voidable—Capacity to contract—Counterclaim by a third party and costs.*—.

Under the Indian Contract Act, where a minor purports to contract, his alleged contract is void and not merely voidable ; he is a person who is not competent to contract.

A counterclaim in a suit can only be made by a person who is a defendant in the suit.

Costs allowed against a person, not a party making such a counterclaim.

Ma Hnit v. *Hashim Ebrahim Meter.* (*Sir John Edge.*) ... 353

Contract Act S. 11—Minor—Contract by—Validity. ... 353

———S. 16—Contract—Undue influence — Position to dominate will of another not enough—Use of that position for getting unfair advantage necessary. ... 349

———**S. 23**—*Abkari license—Licensee entering into partnership with stranger in contravention of the terms of the license—Legality of the partnership—Rights of creditor lending moneys to the partnership—Knowledge of illlgality—Onus of proof—Liability of licensee—Extent of—Presumption.*

Where a person who has obtained a license from the Government to sell arrack, takes a partner in the business without the previous permission of the Collector as required by the terms of the license the partnership is illegal.

Nalam Padmanabham v. *Sait Badri Nath Sardar* 35 M. 582. *Thithi Pakurudasu.* v. *Bheemudu* 26 M. 430. *Maruda Muthu Pillai* v. *Rangasami Moopan* 24 M. 401. Relied on

Where the carrying on of a business which is *prima facie* legal becomes *malum prohibitum* under certain circumstances, the burden of proving that a third party was aware of the prohibition lies on the persono asserting the existence of such Knowledge.

Where however a creditor lends money to an abkari partnership with full knowledge of the terms of the license under which the business was carried on, the burden is on him to show that the conditions of the license were complied with and that the partnership was legal if the creditor fails to discharge the burden he cannot recover his debt from the illegal partnership. The licensee however, is liable to repay the creditor, at least in cases where the latter is not a *particeps criminis*. In the absence of anything to show to what extent the licensee was benefitted by the loan advanced to the illegal partnership consisting of himself and another, the presumption is that he was benefitted by half and he would be liable to re-pay that sum to the creditor.

Garapathi Brahmayya v. *Kurella Ramiah* (*Seshagiri aiyar and Moore JJ.*) 123

———**Ss. 64, 65 and 73**—*Contract—Material alteration by plaintiff—Claim for damages for non-performance of contract by defendant—Right to refund of moneys advanced.*

Where a party to a written contract has materially altered its terms without the knowledge and consent of the other party, the former cannot enforce the contract or claim damages for its non-performance by the latter. The plaintiff however is entitled to a refund of the moneys actually advanced by him under the contract to the defendant who has broken the same.

Anantha Rao Pantulu v. *Kandikenda Surayya.* (*Spencer, J. and Krishnan JJ.*) ... 256

———**Ss. 134, 139**—*Applicability—Promissory note—Suit against maker and sureties—Withdrawal of claim against maker during trial—Effect—Plaintiff's right against sureties—English law—Applicability.*

During the trial of a suit on a promissory note brought against the maker and two sureties, the plaintiff withdrew his claim against the maker, the principal debtor. *Held* (1) that there was a reservation of

Contract Act—*Contd.* PAGE.

plaintiff's right to proceed against the sureties, and (2) that the release of the principal debtor during the trial of the suit did not destroy plaintiff's right to proceed against the sureties.

The principle of the English law that the discharge of the principal debtor will not affect the right of suit against the sureties where there is a reservation to proceed against them is applicable in India

Bateson v. *Gosling* L R. 7 C. P. 9 appld.

Natesa Aiyar v. *Appavu Padayachi* 24 M L. J. 488 refd. to.

Ss. 134 & 139 of the Contract Act are applicable to negotiable instruments.

Murugappa Mudaliar v. *Munusami Mudali.* (*Seshagiri Aiyar and Moore J. J.*) ... 131

Co-owners—*Building erected by one in violation of other's rights—Remedy of latter—Mandatory injunction—Right to, where no other remedy possible.*

Where, in a case in which plaintiffs and defendants were joint owners of a lane, defendants put up two pials and steps on that portion of the lane which adjoined their house thereby encroaching upon the common lane and making it less convenient to plaintiffs, *held* that the plaintiffs were entitled to sue for a mandatory injunction for the removal of the obstructions because no other remedy was possible.

Anandachandra Sen v. *Parbathinath Sen* 4 *C. L. J.* 198 (205) dist.

Subbayya v. *Somalingam.* (*Seshagiri Aiyar and Moore JJ.*) ... 491

Court Fees Act S. 7 (v) **and Schedule II** *Article* 17 (6) *Suit by a co-tenant in possession for partition—Suit incapable of valuation—Court-fee payable on.*

A suit by a co-tenant for partition of immoveable property of which he alleges he is in possession on behalf of himself and the other co-tenants is incapable of valuation within the meaning of Schedule II Article 17 (6) of the Court Fees Act and is not governed by S. 7 Clause V of that Act.

Tarachand Mukerji v. *Afzal Beg* 34 *All* 184 and *Ahamuddin Tamiuddin* v. *Amiruddin* 44 I C 216 followed.

Reference under Court Fees Act S. 5. 4 M L J 110 and *Dagadu* v. *Toloram* 33 B 658 dissented from.

Mr. R. P. Gill v. *Lingamallu Varada Raghavayya.* (*Wallis, C. J. and Seshagiri Aiyar J.*) ... 92

Criminal Procedure Code—*S.* 4—"*Trial—Inquiry—Meaning—Chapter VII—Proceeding under, if a trial; S.* 350 (1), *Proviso* (*a*) — *Applicability to proceeding under Chapter VIII.*

Held, by the Full Bench that S. 350 (1) proviso (a) Criminal Procedure Code, applies to a case under S. 107; Criminal Procedure Code.

Per *The Chief, Justice*, "Trial," generally means the determination of the issues arising in the particular case. In a case under S 107 Cr. P. C. an issue undoubtedly arises between the Crown and the accused as to whether he should be dealt with under the sections of the Code, and the determination of that issue is a trial."

Per *Ayling J.*:—The word "trial" as used in the Criminal Procedure Code presupposes the idea of an offence as defined in S. 4 of the Code. No

Cr. P. Code—*Contd.* PAGE.

offence " is involved in an inquiry under Chapter VIII of the Code.; inquiries under that chapter are not trials; and the proviso to S. 350 (1) of the Code does not apply " Suo Vigore " to such proceedings. S. 117 (2), however, attracts proviso (a) to S. 350 (1).

Per *Coutts Trotter, J. Quaere* whether a proceeding under S. 107, Cr. P. C. is a " trial.

S. 117 of the Code requires the whole of the procedure in a summons or warrant case respectively to be adopted by the tribunal which enquires into a security case. The right of the accused to have the witnesses recalled is not a substantive right but a right relating to the procedure to be adopted

Yelluri Venkatachennaya In re. (*Wallis C. J., Ayling and Coutts Trotter JJ.*) ... 370

———**Ss. 110 (a) and (b) and 117 (3)**—*Evidence necessary to prove charges under—Evidence of repute, admissibility of—Hearsay evidence—Polic reports, value of—Order under S. 112, contents of—Defect in order—Effect of.*

Where a preliminary order under S. 112 of the Criminal Procedure Code merely reproduces the clause of S. 110 without setting forth the substance of the information against the accused the proceedings under S. 110 cannot be regarded as legal. Where however the defect in the preliminary order did not prejudice the accused in the trial and he let in all his evidence, the proceedings will not be quashed on the ground of the defect in the order.

When a person is charged under S. 110 (f) of the Cr. P Code, evidence of general repute is not admissible to prove that he is a desperate and dangerous character. To prove the charge against him evidence of specific acts showing that he is a desperate and dangerous character, is necessary.

Per Seshagiri Iyer, J.—To sustain a charge under S. 110 cl. (*a*) to (*e*) of the Cr. P. Code, the evidence must relate to particular instances which have come to the knowledge of the deponent. Evidence relating to mere beliefs and opinion without reference to acts or instances which are the grounds for such opinion, are hardly evidence of repute within S. 117 (3) of the Criminal Procedure Code Habitual criminality cannot be regarded as established by the repetition of beliefs and opinions.

In proceedings under S. 110 of the Cr. P. Code police evidence should, if not wholly discarded, be allowed to influence the judgment of the magistrate as little as possible.

Per Moore, J.—Hearsary evidence of repute and is admissible for the purpose of proving a charge under S. 110 (*a*) to (*e*) of the Cr. P Code. When it is sought to prove the reputation of a person the evidence required is that of respectable persons who are acquainted with the accused and live in the neighbourhood and are aware of his repuation. The test of the admissibility of the evidence of general opinion is whether it shows the general reputation of the accused and it should at least be the opinion of a considerable number of persons. It must not merely be the repetition of what certain persons have said to the witnesses.

Kothamidde Ranga Reddi Inre. (*Seshagiri Aiyar aud Moore JJ.*) 97

———**S. 112**—Order—Contents of—Defects in order—Effect. ... 97

Cr. P. Code—*Contd.* PAGE.

———**S. 145**—*Possession Proceedings—Magistrate—Refusal to take oral evidence—Legality—Revision—Interference in—High Court—Jurisdiction—Documents showing title—Admissibility—Evidentiary value.*

In possession proceedings relating to a tract of forest land, the Magistrate inspected the locality, and, being of opinion that the inspection completely satisfied him as to the point in issue, *viz.*, the fact of actual possession of the disputed property, declined to take oral evidence and passed an order after discussing the documentary evidence (showing title to the property) filed in the case. *Held*, that the Magistrate acted without jurisdiction in refusing to take evidence and that the High Court had jurisdiction to aside his order.

Documents showing title to the property in question should only be utilised for the purpose of elucidating the evidence that may be admitted in the case and should not, by themselves, be used for concluding the question as to possession.

Srimanavedan Raja v. *Parapravan Moidu* (*Seshagiri Aiyar and Moore J.J.*) ... 78

———**S. 190 (1) (c)**—*District Magistrate—Cognizance of offence on information received by him in another capacity—Legality of.*

S. 190 (1) (c) of the Code of Criminal Procedure empowers a District Magistrate to take cognizance of an offence upon information received by him in another capacity *viz.*, as president of the District Board.

Thakur Pershad Singh v. *The Emperor* 10 C. W N. 775 not followed.

Lakhi Narain Ghose v. *Emperor* 37 C. 221 referred to.

Sundaresan In re. (*Abdur Rahim, and Spencer J.J.*) 219

———**S. 235**—*Misjoinder of charges—Receiving stolen property and cheating—charges of—Joinder-Validity—ss. 256, 257—scope and applicability—Accused entering upon his defence—What amounts to—Prosecution witness allowed to depart on representation that accused would not require him further—Application to re cross-examine one under* S. 256 *or* 257—*Evidence in judicial proceeding—Admissibility in later proceeding—cross-examination in part—Right to futher cross-examine—Effect.*

The accused was employed in Messrs. Oakes & Co., as Works Manager. The case against him was that he purchased certain machinery for the company for Rs., 2,000, but represented to the Managing Director, Mr. Wilson, that the amount was Rs. 3,000, and consequently obtained a cheque from him for the latter amount. The original charge against the accused was that he received stolen property from the vendor. After the prosecution evidence was closed, an alternative charge under S, 420 I. P. C. was added. Mr. Wilson was one of the prosecution witnesses, and, after his examination and cross-examination were concluded, the accused's counsel stated that he would not be required for re-cross-examination even in case a charge was to be framed.

After the charge was framed, the accused pleaded not guilty and gave to the court a list of witnesses he desired to examine in his behalf. Immediately he also applied for re-summoning Mr. Wilson. After several adjournments granted for the purpose of enabling the accused to secure the attendance of Mr. Wilson, the Magistrate disposed of the case without

Cr. P. Code—*Contd.* PAGE.

having any further examination of Mr. Wilson, convicted the accused of the offence of cheating. On appeal against the conviction.

Held (1) as regards the plea of misjoinder of the charges of receiving stolen property and of cheating, that the case was governed by S. 235 Cr. P. C.;

(2) that the right referred to in S. 256 Cr. P. C, applied only to cases of witnesses actually before the court when the charge is read out.

(3) that the accused had entered upon defence before applying to recall Mr. Wilson and his application for the purpose must be deemed to have been made under S. 257 Cr. P. C. which gives the Magistrate discretion in the matter.

Per Seshagiri Aiyar, J:—A waiver by Counsel cannot prejudice the right of the accused under Ss. 256 and 257 Cr. P. C.

Once the opportunity to cross examine is exercised, the evidence of a witness in a judicial proceeding becomes complete for the purpose of being admitted in a later proceeding and the mere fact that the witness could have been subjected to a further cross-examination in the exercise of a further right does not render such evidence inadmissible.

Per Phillips:—If a witness is allowed to depart on the representation of the accused that he will not be further required, any further application to re-cross-examine him must be deemed to be one under S. 257 Cr. P. C.

Lockley v. *Emperor*. (*Seshagiri Aiyar and Phillips JJ.*) ... 209

———Ss. 256, 257—Scope and applicability—Accused entering upon his defence—What amounts to—Prosecution witness allowed to depart on representation that accused would not require him further—Application to re-cross-examine—Maintainability. ... 209

———S. 350 (1) Proviso (a) Applicability to proceeding under Ch VIII. ... 370

———S. 436 (4)—*Case pending before Sub Magistrate—Police prosecution—Application by prosecution witness to the District Magistrate for committal and its rejection—Whether Sessions Judge can suo motu order committal after discharge by the Sub-Magistrate—Complaint disclosing an offence—Dismissal by the Magistrate—No charge framed—Whether amounts to discharge.*

The accused was charged under Ss. 147, 323 and 325 of the Indian Penal Code before a Sub-Magistrate and while the case was pending before him a petition was made to the District Magistrate by the first prosecution witness to call for the records and direct a committal of the case to the Sessions. As the prosecution was by the Police the Dt. Magistrate sent the petition to the Police and finally rejected it on the ground that the Police were satisfied with the procedure of the Magistrate and also on the ground that the petition was incompetent. Then the accused was discharged by the Sub-Magistrate on the complaint which alleged facts against the accused constituting an offence under S. 302 of the Indian Penal Code. The Sessions Judge acting suo motu under S. 436 of the Criminal Procedure Code set aside the order of discharge and directed the committal of the accused under S. 304 of the Penal Code.

Held, under such circumstances that the order of the District magistrate was no bar to the action taken *suo motu* by the Sessions Judge. S.

Cr. P. Code—*Contd.* PAGE

435 sub-section (4) does not apply to the case *Kalimuthu* v. *Emperor* 26 M. 477 distinguished.

Where a complaint alleges facts constituting an offence under a particular section and the Magistrate disbelieves the evidence on the point and does not frame any charge under that section the action of the Magistrate amounts in law to an order of discharge on those counts even though no express order of discharge is recorded by him. *Krishna Reddi* v. *Subbamma* 24 M. 136 followed.

Gandi Apparazu Inre (*Spencer and Krishnan JJ.*) ... 194

Damages—Assessment—Principle—Indemnity clause—Damages for breach of—Costs of litigation—Recovery of ... 470

Deed—Security bond construction—Security for performance of appellate decree—liability if confined to first appellate decree ... 302

Easements Act, S. 12—*Right to easement—Tenant having a permanent interest on the land, if can acquire a right by prescription in other land of lessor.*

A tenant of land, though having a permanent right of tenancy on the land cannot acquire an easement by prescription in other land of his lessor.

Gayford v. *Moffat L. R.* 4 *Ch A* 133 *Mani Chander Chakerbutty* v. *Baikanta Nath Biswas* 29 *Cal* 363 relied on.

Basavanagudi Narayana Kamthy v. *Lingappa Shetty* ... 26

Ejectment Right of—Public trust—Permanent lessee from trustee... Right to eject trespasser ... 198

Estoppel by Judgment—Rule of—Applicability to persons not parties to Judgment ... 266

Evidence—Admissibility—objection to, not taken in courts below Effect. ... 476

——— *Admissibility—Prior suit between same parties—Evidence in... Admissibility by consent of, parties—Evidence Act, Ss. 3, 165—Effect.*

The consent of the parties to a suit can make admissible the evidence given in a previous judicial proceeding between them even in a case in which the conditions prescribed by S. 33 of the Evidence Act do not exist.

Per *Krishnan, J.*—The provisions of S. 33 are intended for the benefit of a party to a suit and he may waive their benefit at any rate in a civil suit where no question of public policy is involved.

Quaere as to the position in a criminal trial.

Ponnusami Pillai v. *Singaram Pillai*, 38 M. 160. Overruled.

Jainab Bibi Saheb v. *Hyderally Saheb.* (*Wallis C. J. Coutts Trotter and Krishnan JJ*) ... 532

———Promissory note payable on demand—Contemporaneous agreement postponing date of payment—Admissibility in evidence ... 70

———**S. 33**—Judicial Proceeding—Admissibility in later proceeding... Cross-examination in part—Right to further cross examine—Effect ... 209

———**S. 114** (*a*)—*Applicability—Presumption under Section — Time limit accused found to be in possession of alleged stolen article 18 months after alleged theft—No presumption—Accused not bound to explain possession.*

Evidence—*Contd.* PAGE

In a case in which the accused was found to be in possession of alleged stolen articles thirteen months after the alleged theft, *held* that the case was not one for raising the presumption under S. 114 (*a*) of the Evidence Act and for calling upon the accused to explain his possession. *Ina Sheikh* v. *Queen Empress* 11 C. 160 followed.

Jaimullabdin In re. (*Seshagiri Aiyar, J.*) ... 489

Guardian and ward—Agent appointed by guardian—Ward's right of suit against—Suit for account—Maintainability ... 247

Highway—*Dedication to the public—Intention to dedicate—Cannot be inferred from permissive use by tenants or their visitors—Dedication to a section of the public insufficient" street "—" public street"—Punjab. Municipal Act,* 1911, (*Act III of* 1911) *Ss.* 3. 171.

In cases where the existence of a public highway is in issue, it is of crucial importance to distinguish between the grant to the public as such of a right of way and the permission which naturally flows from the use of the ground as a passage for visitors to or traders with the tenants whose shops abut upon it.

A person in dedicating land to public use may limit the purpose of the dedication as he wishes, but the dedication must be to the public as a whole. This cannot in law be a dedication to a limited part of the public.

In order to constitute a valid dedication to the public of a highway by the owner of the soil, there must be an intention to dedicate. User by the public is only evidence of such intention.

Muhammad Rustam Ali Khan v. *Municipal Committee of Karnal City* (*Lord Shaw.*) ... 455

Hindu Law—*Alienation by widow—Legal necessity—Burden of proof—Effect of efflux of time.*

An alienation by a Hindu widow is challengeable on the ground that it was made without legal necessity, (within the limits of the ordinary law of limitation) however long time has elapsed. But when the transaction took place long ago, such full and detailed evidence as to the state of things which gave rise to the sale cannot be expected as in the case of alienations made at more or less recent dates. In such circumstances presumptions are admissible to fill in the details which have been obliterated by time.

Venkata Reddi Pantulu Garu. v. *Rani of Wadhwan.* (*Lord Shaw.*) ... 393

——*Ancestral family dwelling house—Residence in—Right of female members of family—Distinction between widow and unmarried daughters of last owner and widows of deceased co-parceners and unmarried sisters—Sale of family house in execution of decree against brother—Effect on right of residence of unmarried sisters—Suit debt only private debt of brother—Effect.*

The unmarried sisters of a Hindu are, under the Hindu Law, entitled to reside in the family house till their respective marriages, and their right of residence is not affected by a sale in execution of a decree obtained against him for a debt incurred by him not for family necessity but for his own personal benefit. A portion of their right is not affected by a sale for the debt of their brother's next female heir and legal representative.

Hindu Law—*Contd.*

In this respect, the wife and the unmarried daughters of the debtor stand on a different footing from the widows of the deceased co-parceners (including the mother) and from unmarried sisters.

Quaere :—Whether a private sale of a person's ancestral family dwelling house without necessity can deprive even his wife and unmarried daughters of their rights of residence.

Suryanarayana Rao Naidu v. *Balasubramania Mudali.* (*Wallis C.J. and Sadasiva Aiyar J.*) ... 435

————Debt—Father—Personal debt of—Son's liability for, during father's lifetime. ... 402

————Impartible Estate ... 149

————*Inheritance—Exclusion from—Grounds — Insanity—Effect—joint-family — Insane member—Right to take family property by survivorship.*

In a joint Hindu family consisting of father and his son, the father became insane aftes his son attained majority, survived his son, and died without recovering sanity. In a competition between the father's and son's heirs. *held*, that the father did not lose his right in the family property by becoming insane, and took the son whole property by survivorship on the death of his son and that the fathers' heirs were entitled to the same in preference to those of the son.

Insanity, to be a ground of exclusion from inheritance need not be congential. The rule in Ch. 11 S 10 placitum 6 of the Mithakshara that a person is excluded, if he is disqualified at the time of .partition, is not a pronouncement that the right ripens and is capable of enforcement only then but a principle indicating who all should be alloted shares at the division. The right of a member of a joint Hindu family to share in family property comes into existence at birth and subsists all through, although it is incapable of enforcement at the time of partition because of the disqualification then existing. ...

Muthusami Gurukkal v Meenammal. (*Seshagiri Aiyar and Moore JJ*) ... 291

————*Joint family—Ancestral trade—Debts contracted by manager—Liability of minor members.*

In the case of trading families like the Komati Chetties, if moneys are borrowed for the purpose of an ancestral business carried on by the joint family, all the members of the family including minors are liable for the repayment of such sums, to the extent of their share in the whole family property including the assets of the business.

Malaiperumal Chettiar v. *Arunachella Chettiar, C. L. W.* 417 *Muthiya Pillai* v. *Tinnevelly South Indian Bank* 5 L. W. 841 Relied on.

Sanka Krishna Murti v. *The Bank of* Burma 35 M. 672=21 M. L. J, 508 distinguished.

Thammanna Chinna Lakshiminarasimhan v. Akasapu Venkanna Chinniah, (*Abdur Rahim O. C. J. and* Odgers *J.*) ... 55

————*Joint family—Mortgage by father—Suit thereon against him and his sons—Decree under* Or. 34 *R* 6 *C. P. C.—Plaintiffs' right to—Personal decree before sale of mortgaged property—Validity—Father's*

Hindu Law—*Contd.* PAGE.

debt—Sons' liability during father's life-time—Sahu Ram's case—Effect.

In a suit against a Hindu and his sons upon a mortgage bond executed by the former, the court found the mortgage to be not binding as such upon the sons, passed a decree for sale in respect of the father's share of the mortgaged property and declined to pass a decree under Or 34 R 6 C. P. C. though the plaintiff had expressly-prayed for it. The claim for a decree under Or. 34 R. 6 was within time and the mortgage debt *qua* debt was not proved to be illegal or immoral. *Held*, in second appeal, that the plaintiff was entitled to a conditional decree for the recovery from the mortgagor personally and from the ancestral properties of himself and his sons of any balance left in case the net proceeds of the sale of the father's share of the mortgaged property was found to be insufficient to pay the amount due to him.

A conditional decree under Or. 34 R 6 can be passed in the mortgage suit itself without waiting for the mortgaged property to be sold to ascertain if any balance would be left over.

The observations in *Sahu Ram's case* did not alter the law as to the pious obligation of a Hindu son, even during his father's life time, for a debt of the latter, which is not immoral or illegal.

Kandasami Goundan v. *Kuppa Moopan.* (*Oldfield and Krishnan JJ*) ... 208

————Joint family—Nattukottai chetti trading family—Manager—Acceptance of money on deposit on thavanai terms—Validity. ... 478

————*Partition—Adopted son and subsequently born aurasa son—Partition between father, aurasa son and adopted son—Share of adopted son—The applicability of Vasishta's text.*

In a partition between the father, his *aurasa* son and a son adopted before the birth of the *aurasa* son, the adopted son is entitled to one ninth share, the father and the *aurasa* son being each entitled to a four ninths share of the family properties.

The rule of Vasishta is applicable in all cases of partition of patrimony *interse* between the members of the joint family, the adopted son taking in such cases only a limited share.

In cases of collateral succession, the share of the adopted son is as extended as that of a natural born son.

Case law on the subject and the texts of Hindu Law, discussed.

Vankamamidi Balakrishnayya v. *Vankamamidi Venkata Triambakam* (*Seshagiri Aiyar and Moore J. J.*) ... 86

————**Religious Endowment**—Temple—Worshipers—(Right) suit for declaration that alienation of temple properties is invalid—Maintainability. ... 226

————*Widow—Accumulations—Incorporation—Intention of parties—Evidence—Interest on investments—Nattukottai Chetti—Deposit on Thavanai terms—Nature of Suit to recover—Limitation as to principal and interest—Limitation Act—Arts, 60 63—Applicability—Nattukottai Chetty trading family—Manager—Acceptance of money on deposition thavanai terms—Validity*

Held, on the evidence in the case that the widow of the last male owner acquiesced in the interest accrued due during her lifetime on her

Hindu Law—*Contd.* PAGE.

husband's investments being treated as part of his estate and that his reversionary heirs were entitled to the said interest and not the heirs of the widow.

Quaere as to the rule applicable if the evidence merely were that the widow had failed to collect the interest on money forming part of her husband's estate.

In a deposit with Nattukottai Chetties on thavanai terms the understanding between the parties is that, at the end of each thavani period, the interest for that period instead of being payable cash to the creditor should be added to the deposit so that both should be treated as a fresh deposit.

A suit to recover a deposit with a Nattukotti Chetti on thavanai terms is governed by art 60 of the Limitation Act both as to principal and as to interest. The claim as to interest is not governed by art. 63 of the Act.

It is within the competence of a manager of a joint Hindu Nattukottai Chetty trading family to accept money on deposit on thavanai terms.

Narayanan Chetty v. *Suppiah Chetty.* (*Wallis C. J. and Krishnan J.*)... 437

Impartible Estate—*Custom of impartibility—Primogeniture—Evidence of—Madras Regulation XXV of* 1802—*Ground of sanad, effect of*—*Suit for partition—Heirs of tenantse-in-common—Adverse possession—Limitation—Limitation Act, art* 127 *and* 144—*Registration Act, Ss* 17 (3), 23: 26, 35, 40, 41 *and* 87 *authority to adopt executed outside British India by subject of Native State Registration, if necessary—Document, presentation of after expiry of prescribed period—Registration, if valid—Presentation of document by natural father of minor given in adoption—Effect of*

The question whether an estate is impartible and descends by the law of primogeniture or is subject to the ordinary Hindu law of inheritance must be decided on the facts of each case. *Held*, on the evidence in the case, that the Zemindari of Munagala was an impartible estate.

Per Chief Justice : In the persent case, there was even before the permanent settlement, an hereditary property in the Zamindary to which the custom of primogeniture could attach and the permanent Settlement of 1802 merely recognised and confirmed the proprietary rights of the Zemindar subject to a fixed assessment.

Ramakanta Das Mohapatra v. *Shamanand Das Mohapatra* 36 C. 590=19 M. L. J. 239 distinguished. *Mallikarjuna* v. *Durga* 13 M. 406=17 IA. 134 Relied on.

Per Sadasiva Iyer, J.—Whether a Zemindari had an ancient origin, whether it was in the nature of a military tenure, whether there has been a confiscation and re-grant, whether the Government divided the estate and re-granted it in parcels to junior members of the family or to strangers,—these and similar considerations are relevant to the determination of the question of impartibility. Of greater evidentiary value than these, are the course of descent of the property for generations, the inner conviction of the members of the family as shown by their conduct and declarations from time to time and the admissions by members of the junior branches against their own interest.

Impartible Estate—*Contd.* PAGE

Art. 127 of the Limitation Act applies to suits by one or more members of a joint family against other members to enforce a right to share in the joint family property and does not apply to a suit brought after partition by some members of the family when they have become tenants-in-common and the exclusion is therefore not from joint family property within the meaning of the article. A suit for partition by the heir of one tenant-in-common against the heirs of the other tenants-in-common is governed by Art. 144. Where on the death of one of the tenants-in-common, his heir enters into exclusive possession of the whole property asserting an absolute and exclusive title in the deceased, the possession of the heir is adverse to the surviving tenants-in-common or their heirs.

S. 17 (3) of the Registration Act has no application to an authority to adopt executed outside British India in a Native State by a person domiciled in that State. S. 49 of the Registration Act does not therefore, render the document inadmissible in evidence for want of registration.

Observations on the extra-territorial operation of municipal legislation.

Cooke v. *Charles A. Vogeler and Co.* (1910) *A. C.* 102, *Dulaney* v. *Merry and Son* (1901) 1 Q. *B.* 53. *Swifte v. Attorney General for Ireland* (1912) *A. C.* 276. Referred to.

Obiter : The registration of a document, other than a will, presented beyond the period prescribed by Ss 23 to 26 of the Registration Act, is invalid. It is not a mere irregularity in procedure cured by S. 87 of the Act.

The natural father of a minor boy who is adopted by a widow in pursuance of a written authority to adopt given by her husband, is competent to present that document for registration on behalf of the minor.

Raja Keesara Venkatappayya v. *Raja Nayani Venkataranga Rao.* (*Wallis C. J. and Sadasiva Aiyer J.*) ... 149

Income Tax Act (*VII of* 1918—*Ss.* 24 *Proviso* 2, 39 (*d*) *and* 40 —*Scope and Applicability—Penal Assessment—Order for—Subsequent Prosecution under S.* 39 (*d*)—*Maintainability—S.* 24 *Proviso.* (2)—*Effect.*

Held, that a prosecution of an assessee under S. 39 (d) of the Act for failure to produce his account books in obedience to a notice issued to that effect was not barred by proviso 2 to S. 24 of the Act by reason of a prior order for penal assessment made against him by the Collector under S. 24 of the Act on the ground that he had made a false return, even though, in making the order under S. 24 the Collector treated the non-production of account books by the assessee as evidence of the falsity of his return.

The proviso to S. 24 is intended to bar a prosecution under S. 40 of the Act, not one under S. 39.

The only ground on which the Collector can direct a penal assessment under S. 24 of the Act is that the assessee has made a false return; the Collector cannot do so on the ground of non-production of account books by the assessee.

Inherent Power. PAGE.

King Emperor v. Hussain Ally & Co. (Ayling and Coutts Trotter JJ.)... 333

Inherent Power—Appellate Cont—Power to allow appeal to be continued in forma pauperis. 146

Interest—*Method of calculation may be fixed by long standing practice of parties—Implied contract to pay interest in accordance with such practice—written contract will not exclude proof of implied agreement not inconsistent with its terms—Indian Evidence Act (Act I of* 1872) *S* 92.

The appellants had for many years been allowed to over-draw their account with the respondent Bank. The Bank in fact charged them compound interest with monthly rests and such charge appeared on the face of their pass books. The appellants annually gave the Bank a letter in a printed form in which they merely agreed to pay interest on the daily balances

Held that S. 92 of the India Evidence Act did not prevent the Bank from proving an agreement by the appellants to pay compound interest with monthly rests, and that such an agreement could be implied from the appellants long acquiescence in such a method of calculation.

Haridas Ranchordas v Mercantile Bank of India Limited (Sir John Edge) ... 387

Judgment—Estoppel—Judgment binding on parties whose title is later in origin, ... 266

Land Acquisition—*Improvement Schemes—Recoupment, principle—Land affected by the execution of a scheme—Calcutta Improvement Act, (Ben. Act V. of* 1911) *Ss.* 41 42, 69, 81.

Under S. 42 of the Calcutta Improvement Act, 1911, an improvement scheme, may provide for the acquisition by the Board of Trustees appointed under the Act of any land comprised in the scheme which will in their opinion be affected by the execution of the scheme.

Held, that land is affected by the execution of a scheme whenever its value is thereby enhanced or diminished.

It is not necessary that the land should be physically affected by the operation of the scheme, or that it should be injuriously affected by severance or otherwise.

Held also, that even though the land is only taken for the purposes of recoupment the Board has the same powers of compulsory acquisition, and the assessment of the value is regulated by the same principles, as if the land were required for the actual working of the scheme : that if it is required for any of the purposes of the Act, whereof recoupment is one, the provisions for compulsory acquisition apply.

The Trustees for the Improvement of Calcutta v. *Chandra Kanta Ghosh. (Lord Parmoor)* ... 511

Landlord and Tenant—*Covenant against alienation—Breach—Forfeiture—Power of Courts to relieve against—English and Indian law.*

A *mulgeni* lease contained a covenant against alienation by the lessee with a provision for re-entry by the lessor on breach of the covenant. The lessee alienated the property and thereupon the lessor sued for possession. *Held* that the court had no power to relieve against the forfeiture and that the lessor was entitled to possession on breach of the covenant.

Landlord and Tenant—*Contd.* PAGE.

The English law on the subject is applicable to this country as a rule of justice equity and good conscience.

Krishna Shetti v. *Gilbert Pinto* 42 M 654=36 M. L. J. 367 Relied on. *Vittappa Kuda* v. *Durgamma*. (*Seshagiri Aiyar and Moore J.J*) ... 190

——*Ryotwari tenure—Occupancy rights—Burden of proof when existence of such rights is questioned—Jurisdiction of second Appellate Court to find facts—Code of Civil Procedure* (*Act V of* 1908) *S.* 103,

Under the system of ryotwari tenure prevalent in Madras, there is no presumption that under-ryots have the right of permanent occupancy and if they assert such a right, the burden of proof is on them, such burden may be discharged by proving a custom, a contract, or a title, and possibly by other means. In the present case it was held to be established by the evidence as a matter of title *viz.*, that the under-ryots had had occupancy rights from the very first.

In this case the High Court in second appeal fixed fresh issues of fact, and referred them for trial to the Court of first appeal. That Court failed to grasp the true meaning of the issues framed, and again dealt with the question in an incomplete manner. The High Court thereupon decided the issues themselves.

Held, that under S. 103 of the Code of Civil Procedure, 1908, the High Court had power to deal with the question involved even though one of fact.

Seturatnam Aiyer v. Venkatachala Goundan. (*Sir Lawrence Jenkins.*) ... 476

Land Tenure—*Malabar Law—Karamkari and Adimayavana tenures—Incidents Inalienability and forfeitability—Custom of—Proof—Onus—Quantum—Ignorance of alienee as to incidents of tenure—Effect—Forfeiture—Waiver of—Evidence—Limitation Act Art.* 143—*Limitation, Starting point, Knowledge of lessor not material.*

Karamkari and Adimayavana tenures are not inalienable by custom in south Malabar and the Jenmi is not entitled to forfeit them on alienation.

The burden is on the landlord to prove the custom of inalienability and forfeitability of such tenures. Evidence relating to Pravarthianubhavam grants which are grants for the performance of future services is inadmissible in considering the question of the existence or otherwise of the custom of inalienability and forfeitability as the resumption of Pravarthianubhavam grants arises under the general law itself and not from any special custom.

A right of forfeiture of a holding on alienation and even inalienability of it cannot be inferred from the mere existence of a right of escheat in the landlord on the failure of the grantee's heirs.

Resumability does not follow from inalienability the right of presumption and re-entry on alienation must be expressly given.

Prima facie alienation of any portion of a holding will offend against the rule of inalienability if there is one; and unless it can be shown that under the very custom which imposes the rule of inalienability, the rule does not apply to partial alienations, a partial alienation will be sufficient to work a forfeiture

Land Tenure—*Contd.*

Ignorance on the part of the alienees of inalienable holding as to the inalienability and of such a tenure cannot raise any estoppel against the landlod if he was in no way responsible for such ignorance nor can the fact that the landlord did not exercise his right of enforcing forfeiture in the case of previous alienations.

Under Art. 143 of the Limitation Act the starting point of Limitation is the forfeiture itself; there is nothing in the article about the lessor's knowledge.

Zamorin's Estate, Calicut v. *Unikat Karnavan Samu Nair* (*Ayling and Krishnan J.J.*) ... 275

Legal Practitioner—Vakil—Compromise—Powers of—Unconditional withdrawal of Validity. ... 322

———**S. 13 (b) and (f)**—*Pleader—Misconduct—Application for appointment as guardian of minor's properties—Guardian directed to furnish security—Pleader advising client to pay money from minor's estate to the sureties as consideration for suretyship—Propriety of the transaction.*

The father of a minor Hindu widow applied to the court to be appointed guardian of her properties. Being unable to find the required security, he sought the advise of a pleader who directed him to two other persons who consented to become sureties under an agreement by which a portion of the income of the minor's estate was to go to them for four years as consideration for their suretyship. It appeared that in case the father of the minor was not appointed guardian, a salaried gurdian would have been appointed by the court and in view of this contingency, the agreement between the guardian and the sureties was not detrimental to the interest of the minors. Moreover there was nothing to show that the pleader in advising the guardian to enter into the agreement with the sureties, did not believe it to be a proper transaction and one that was beneficial to the minor.

Held, on these facts, that there was no cause for proceeding against the pleader under S. 13 (*b*) or (*f*) of the Legal Practitioners Act.

Re Lucas Pan v. *Blair* (1900) Ir. rep 292 Ref *Fateh Singh* v. *Sanwal Singh* 1 A. 751

In the matter of a First Grade Pleder. (*Abdur Rahim O. C. J. Sadasiva Aiyar and Burn J.J.*) 58

———**Ss. 13 (f) and 14**—*Pleader—Criticism of criminal administration of a district—Publication in newspaper—Disciplinary action against pleader if justifiable.*

The phrase "any other reasonable cause" in S. 13 (f) is not restricted to professional misconduct in the ordinary sense but covers other misconduct which unfits a pleader for the practice of the profession, *e. g.*, conviction for a crime involving dishonesty or moral turpitude or gross and habitual contempt of court. Where, however, a pleader as a member of the public, criticises through the medium of a newspaper the administration of criminal justice in a particular district, he does not render himself liable to disciplinary action under S. 14 of the Legal Practitioners Act, even though such criticisms may, on enquiry, be found to be unjustified and to exceed the limits of fair comment.

Life Insurance Policy. PAGE.

Subramania Aiyar v. *The District Magistrate of Salem.* (*Abdur Rahim O. J. C. Spencer and Krishnan JJ.*) ... 230

Life Insurance Policy—*Rights of policy holder—Suit for refund of premia paid—Maintainability—Conditions—Resolution of company affecting previously acquired rights of policy-holder—Validity—Effect.*

Plaintiff's mother took out a policy in the Tanjore Life Assurance Company on 22-5-1906 which provided that if the accused paid the future premium at one rupee per mensem until 20th May 1921 or till her death the company would be liable to pay her or her assignee (the plaintiff) such sum as shall become due and payable by virtue or the rules contained on the back thereof agreeable to the regulation of the Company on the completion of 15 years premium or on satisfaction of proof of death and title of the assured. Under the rules of the company then in force, policy-holders had the option of discontinuing the payment of the monthly premiums after they had paid for 60 months. Plaintiff's mother paid the premia for 61 months, that is, till May 1911 but made no further payments and died on 6-4-1914. In a suit brought by plaintiff for, *inter alia*, a refund of the premiums paid by his mother, the Assurance Company contended that plaintiff was not entitled to a refund because the policy had lapsed owing to the non-payment of the premiums and relied upon a resolution passed at an extraordinary meeting of the share-holders of the company in or about January 1911 to the effect that the premia should be continued to be paid till the death of the assured. No notice was given to plaintiff's mother about this extra ordinary meeting and she did not take out the policy subject to the rules then existing *as well as to the rules which might be framed or altered otherwise. Held*, overruling the contention of the Assurance Company, that the rule relied upon by it was not binding on plaintiff's mother and could not affect the rights acquired by her under the policy before the said rule was passed and that plaintiff was therefore entitled to a refund of the premia paid.

The Tanjore Life Assurance Co., Ltd. v. *Kuppanna Rao.* (*Seshagiri Aiyar and Moore JJ.*) ... 135

Limitation—*Adverse possession—Assertions of ownership by possessor, their effect—Indian Limitation Act (Act XV of* 1877) *Sched. II Art* 144.

The question whether possession is adverse or permissive may often be one of legal inference from documents, concurrent findings on which of the lower courts will not be binding on the Privy Council.

In the present appeal the Board held that the possession of a certain Hindu widow was adverse to the reversioners, although the lower courts had concurrently found that she was in possession only in lieu of maintenance.

Chaudhri Satgur Prasad v. *Kishore Lal* (*Viscount Haldane.*) ... 259

———*Adverse possession—Does adverse possession change its character when the possessor acquires title—Gift—Unregistered document—Documents inadmissible in proof of title—May serve to evidence nature of possession—Possession of co-parceners whether the old English rule applies to co-sharers in a village other than members of a joint*

Limitation—*Contd.* PAGE

family. Transfer of Property Act (*Act IV of* 1882) *S.* 123—*Indian Limitation Act,* 1908) *Act IX of* 1908 *Schedule I, art* 144.

A petition reciting a gift, and praying that the villages subject of the gift be transferred to the donee's name, though inadmissible to prove title, may be admissible to prove the character of the donee's possession.

Where a person has begun to hold possession adverse to two co-sharers, and before the statutory period of limitation, succeeds to the title of one of the two, his possession continues to be adverse, to the other co-sharer, though he has become jointly interested with the latter.

Semble, that the rule that the possession of one of several co-parceners, joint tenants or tenants-in-common is the possession of all does not apply to shares in an unpartitioned agricultural village in India not holding their shares as members of a joint Hindu family.

Varada Pillai v. *Jeeva rathnammal* (*Viscount Cave.*) ... 313

———Adverse Possession—Tenants in-common ... 149

———Cause of Action—Accrual of Fresh cause of action and suspension of time under existing cause of action—Distinction ... 1

———Construction—Suspension of time—Grounds not provided for in Act, if exist ... 1

Limitation Act Ss. 4 and 12 (2)—*Appeal—Deduction of time requisite for obtaining copies—Judgment pronounced in Vacation—Application for copies after re-opening of court—Deduction of time.*

The court below pronounced its judgment on 21—12—1918, the first day of the Christmas vacation. The appellant applied for copies of the judgment and decree on 7th Jan. 1919 when the Court re-opened after the vacation and obtained the copies in due course. The appellant appealed to the High Court with the copies so obtained and claimed to deduct the time from 22—12—1918 to 6—1—1919 from the period prescribed for appealing. *Held* that the appellant was not entitled to the deduction of time claimed by him. The "time requisite for obtaining a copy" in S. 12 (2) of the Limitation Act means the time reasonably requisite for the purpose and a party cannot ordinarily claim deduction of any period antecedent to his presenting an application for copies.

Donepudi v. *Subrahmanyam* v. *Narasimham.* (*Wallis C J. and Krishnan J.*) 465

———**Sec. 9 and Art 180.** *Sale in execution—Confirmation of sale—Subsequent application for setting aside sale—Sale sustained with regard to some items and set aside with regard to the others—Application for possession by execution purchaser within three years of the second order, but more than three years after the first confirmation of sale—Whether application in time—Accrual of fresh cause of action and suspension of time under an existing cause of action, distinguished—Whether there are grounds for suspension of time not provided for in the Limitation Act—Privy Council decisions discussed.*

The legal representatives of the decree-holder bought certain properties of the judgment-debtor in execution of his own decree on 25—3—1913. On 26—4—1913 the sale was confirmed. On 3—1—1914 an application for setting aside the sale was presented and admitted out of the due time on the ground of fraud. On this application, the sale was set aside as regards some items and sustained as regards the others by an order dated 25—6—1915 which was confirmed on appeal on 13—5—1916, and a petition for delivery of possession of the properties regarding which the sale was sustained was presented on 19—2—1917.

Held per curiam, that such petition for delivery of possession was in time under Article 180 of the 1st schedule to the limitation Act.

The decisions of the Privy Council on the question of suspension of limitation reviewed and discussed.

Per the Offg Chief Justice and Burn J.

Where an application if made for delivery of possession of properties sold in execution of a decree, the sale does not become absolute within the meaning of the third column af Article 180 until the application made to set aside the sale under rule 89 or 90 or 91 has been disallowed and the sale upheld, although an order confirming the sale had been passed before the application to set aside the sale was made.

Any deduction of time based on a rule of exclusion or suspension of time covering a larger ground than that traversed by sections 12, 14, 15, 16 and other similar provisions of the Limitation Act, would be unjustified.

Per Oldfield, J : The existence of the cause of action for an application for delivery, to which Article 181, schedule I, Limitation Act applies is not suspended during the pendency of proceedings for the setting aside of the sale, if in the circumstances time has begun to run.

There is not a general equitable principle, apart from the provisions of the Limitation Act, under which time which has once begun to run is suspended.

Per Sadasiva Aiyar, J : Whenever proceedings are being conducted between parties *bona fide* in order to have their mutual rights and obligations in respect of a matter finally settled, the cause of action for an application or for a suit the relief claimable wherein follows naturally on the result of such proceedings should be held to arise only on the date when those proceedings finally settle such rights and liabilities.

Notwithstanding Section 9 of the Limitation Act, there are some exceptional cases where suspension even as regards the running of time on the cause of action for a suit can take place.

In the present case, the application for possession is not barred by limitation in either aspect *viz.*, on the ground of the accrual of a fresh cause of action or on the ground of the suspension of limitation.

Though Section 9 of the Limitation Act in terms relates only to a suit and not to an application, the words " to sue" have been taken as including "to apply in execution" *Jivraj Gulab chand* v. *Babaji* 29 B. 68 ; *Bhagwant Ramachandra* v. *Kaji Mahamad Abas* 36 Bon 498 Ref to.

Per Seshagiri Aiyar. J ; The true rule deducible from the various decisions of the Judicial Committee is that subject to the exemptions, exclusions, mode of computation and the excusing the delay etc, which are provided in the Limitation Act, the language of the third column of the first schedule should be so interpreted as to carry out the true intention of the legislature, that is to say, by dating the cause of action from a

Limitation Act—*Contd.* PAGE.

date when the remedy is available to the party. This is a rule of construction and not a rule of law.

Muthu Korakki Chetty v. Mohomad Madar Ammal (Abdur Rahim O. C. J. Oldfield, Sadasiawa Aiyar Seghagiri Aiyar and Burn JJ.) ... 1

———**S. 12 (2)** *Time requisite for obtaining copy of decree appealed from —Meaning—Appeal with copy of decree obtained by another party—Appellant if entitled to a deduction under the section.*

Where it appeared that the appellant in an appeal preferred to the High Court applied within the prescribed period for a copy of the decree appealed against but allowed the application to be dismissed for non-payment of the copying charges and subsequently filed the appeal together with a copy of the decree which had been obtained by another party, *held* that the appellant was entitled under S. 12 (2) of the Limitation Act to a deduction of the time taken in obtaining such a copy. *Ramamurthi Aiyar* v. *Subramania Aiyar*, 12 M. L. J. 385 Not. Foll.

Ram Kishna Shastari v. *Kashi Bai* 29 A. 264 Foll.

There are no grounds for importing into S. 12 the restriction that the copy of the decree must have been obtained on the application of the appellant himself.

Aminudeen Sahib v. *Pyari Bai (Wallis CJ and Krishnan J.)* ... 340

———**Art. 11**—*Applicability—Sale in execution of money decree—Application by prior usufructuary mortgagee of the same properties for their sale subject to his mortgage—Dismissal on ground of delay—Suit by him for possession against auction-purchaser in execution of money decree Limitation.*

In execution of a simple money decree properties of the judgment-debtor, which had been usufructuarily mortgaged by him to A, were attached and sold and purchased by B. A few days before the sale, however, A applied to have the properties sold subject to his mortgage and asked the Court to have it so stated in the sale proclamation but his application was dismissed as being too late. In a suit brought by A against B more than a year after the date of the order dismissing A's application for the recovery of possession of the properties on the strength of the mortgage, *held* that the suit was barred under Art. 11 of the Limitation Act and that it was open to B to raise the plea that it was so barred.

Velupadayachi v. *Arumugam Pillai. (Sadasiva Aiyar and SpencerJJ)*... 397

———**Art. 29 and 36** — *Applicability of — Attachment before Judgment —Suit for damages—Limitation.*

Art, 29 of the Limitation Act is not restricted in its application to cases in which the seizure is intrinsically wrongful, as for instance when it is made without jurisdiction. It applies also to a case where the foundation of the claim is that defendant procured the seizure of the plaintiff's property under a perfectly legal process, but by misrepresentations to the Court. *Manavikrama* v. *Avisalam Koya* 19 M. 90 Relied on.

Sokkalingam Chetty v. *Krishnaswami Ayyar. (Oldfield and Seshagiri Aiyar JJ.)* ... 324

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———**Arts**, 60, 63—Applicability—Nattukottai Chetti—Deposit on thavanai terms—Suit to recover, limitation as to principal and interest ... 487

———**Arts**, 69, 73, 80—*Applicability—On demand promissory note—Contemporaneous agreement postponing date of payment—Suit on note—Limitation—Starting point—Admissibility of agreement in evidence—Effect.*

In a suit upon a promissory note executed by the defendant in favour of the plaintiff bank, it appeared that it was customary for the Bank to fix a period for payment and that the defendant's application for the loan was in a printed form in which he added the words "for six months Thavani" and on which the officer of the Bank concerned made an endorsement to the effect that the amount might be lent to defendant "for six months thavanai."

Held, that the application form, with the endorsement thereon, formed part of the same transaction as the suit note and was receivable in evidence for fixing the date of payment of the amount of the note and that the suit on the note was governed by art. 69 or 80 of the Limitation Act, the starting point of limitation being six months after the date of the note.

Quaere whether art. 73 was applicable to the case.

Ponnuswami Chetti v. *The Vellore Commercial Bank Ltd.* (*Seshgiri Aiyar and Moore JJ.*) ... 70

———**Art.** 83—Indemnity clause—Breach of—Damages. Suit for—Limitation—Cause of action. ... 470

———**Art.** 113—*Contract for sale of immoveable property—No time fixed for performance—Purchaser of property in execution sale with notice of the contract—Suit for specific performance — Limitation — Starting point.*

On 17-2-1907 the first defendant agreed to sell a house to the plaintiff, no time being fixed for the performance of the contract. The seventh defendant purchased the house in execution of a money-decree on 17—4—1913 with knowledge of the contract. Plaintiff instituted a suit for specific performance on 26—11—1913 within three years of first defendant's refusal to perform the contract. The seventh defendant was not originally made a party to the suit but was added on 22—12—1914 which would be more than 3 years from the date of refusal by the first defendant to perform his contract. It was not alleged or proved that the seventh defendant had refused performance of the contract more than three years before he was impleaded. The Court below dismissed the suit as barred by time against the seventh defendant.

Held, that the suit was instituted within time under art. 113 of the Limitation Act both against the first defendant and the seventh defendant.

Dundigalla Kesavalu v. *Kalavaguntla Rajaram* (*Abdur Rahim O. C. J. and Odgers, J.*) ...

———**Arts** 127, 144—Partition suit—tenants-in-Common—Heirs of—Limitation—Adverse Possession. ... 149

———**Art.** 140—*Karnam's emoluments — Possession adverse to office-holder—Prescriptive title.*

A person in adverse possession of lands annexed to the office of karnam for over the statutory period acquires a prescriptive title to the lands as

Limitation Act—*Contd.* PAGE.

against the holder of the office and his successors. *Jhalandur Thakur* v. *Jharula Das* 42 C. 244 distinguished.

Dhanushkotirayudu v. *Vankayala Venkatarathnam.* (*Abdur Rahim and Ayling JJ.*) ... 320

———**Art. 143**—Limitation. Starting Point—Knowledge of lessor not material ... 275

———**ART. 144**—Adverse Possession—Rule as to, in case of tenants-in-common, etc — Inapplicability to shares in unpartitioned agricultural village. ... 313

———**Art S. 166, 181**—*Application by exonerated defendant to set side sale in execution of his properties—Application governed by Art.* 181 *and not by art.,* 166.

An application by a defendant who is exonerated by the decree, from liability to set aside a sale in execution of his properties by the plaintiff is governed by Art. 181 and not by Art. 166 of the Limitation Act.

Muthia Chettiar v. *Bava Sahib*, 27 M. L. J. 605 distinguished.

Seshagiri Rao v. *Sreenivasa Rao.* (*Seshagiri Aiyar and Moore JJ*) ... 62

———**Art 180.** ... 1

———**Art, 182 (5)**—*Application in accordance with Law—Application by person ex facie entitled to execute the decree—Order of another court restraining execution—Effect of.*

N obtained a transfer of a decree from the heir of the deceased decree-holder and applied to execute it. He was resisted by G, who claimed to be exclusively entitled to execute the decree, a legatee of the decree-holder. The executing court held that N was entitled to execute the decree and not G. Thereupon G sued N and his transferor for a declaration that he was entitled to execute the decree and for an injunction restraining N from enforcing it. On 14—4—1914 the suit was decreed in favour of G and N was restrained by an injunction from executing the decree or otherwise realising the decree amount. On appeal, this decision was confirmed. In the meantime, on 18—6—1914, and 22—10—1914, N. applied to execute the decree but the application proved infructuous. On 23—3—1916, G. whose rights had by this time been declared by the appellate court, applied to execute the decree and relied on the two intermediate applications by N. as saving limitation.

Held, that the execution application dated 18—6—1914 and 22—10—1914 by N, were in accordance with law and operated to save limitation udder art, 182, (5) of the Limitation Act.

When the two execution applications in question were made, N. was, on the face of the decree, the only person competent to execute it and the executing court not having notice of the result of the litigation between G and N. had no concern with the rights of anybody other than the person appearing on the face of the decree as the decree holder.

Jesoda Daye v. *Kirtibash. Das* I. L. R, 18 C. 689. relied on.

Hari Krishnamurthi v. *Akella Suryanarayanamurthi.* (*Spencer and Seshagiri Aiyar JJ*). ... 271

Madras City Municipal Act (III of 1904)—S. 262—*Permission to erect shed—Necessity—License under S 325—Effect—Permission to erect shed—Validity-Conditions*

Madras City Municipality Act. PAGE.

A license under S. 325 of the Madras City Municipal Act does not cover the permission required under S. 262 of the Act. A person who has obtained a license for storing timber is therefore bound to take the permission of the municipallity for putting up a shed over it.

The permission to erect a shed given by the President must fix the period for which and the boundaries over which, the shed is to be erected.

Corporation of Madras v. *Varadachariar* 42 M. 7 followed.

Nadamuni Nadar In re (*Seshagiri Aiyar and Moore J. J.*) ... 84

——S. 366 cl. (3)—*Penal Code—S. 269—Health Officer—Order directing removal of patient to hospital—Disobedience if and when an offence—Prosecution under S. 269 I. P. C. for disobedince of order under S. 366—Maintainability—Onus of proof on prosecution...*

In a case in which the accused was asked by the Health Officer of the City of Madras to remove his son, who was suffering from small-pox to an Isolation Hospital, he, under the advice of the Medical Practitioner who was treating his son, removed him to an isolated house. In a revision filed against the conviction and sentence passed on the accused under S. 269 I. P. C., *held*, setting aside the conviction and sentence, that, though the refusal to comply with the direction of the Health Officer might have been illegal, it was not unlawful in as much as proper precautions were taken by the accused to prevent infection and to provide a suitable lodging for the person infected.

In a prosecution under S. 366 cl. (3) of the City Municipal Act, the prosecution is not relieved from proving the elements which constitute the offence under S. 269 I. P. C. The prosecution must make out not only that there has been disobedience to the order of the Health Officer but also that the disobedience was unlawful and negligent and had also the effect of spreading infections disease.

Kandaswami Mudaliar In re (*Seshagiri Aiyar J.*) ... 80

Madras District Municipalities Act (IV of 1884) S. 24—*Drains attached to public street—Vesting of in municipality—Adverse possession of drain—Proof of.*

Drains attached to public street and intended to carry off water falling on the street, vest in the municipality under S. 24 of Madras Act IV of 1884, even though the site of the drains might belong to private individuals.

Basawaswaraswami v. *The Bellary Municipal Council* 18 M. 6=28 M. L. J. 479. *The Chairman Municipal Council, Srirangam* v. *Subba Pandithar* 38 M. 456=25 M. L. J. 297. Relied on.

To constitute adverse possession of a street drain as against a municipality, it must be shown that the enjoyment of the drain as a drain by the municipality was prevented openly and as of right.

Arunachala Chettiar v. *Municipal Council of Mayavaram.* (*Sadasiva Aiyar and Burn J. J.*) ... 222

Madras Estates Land Act (1 of 1908) *Applicability—Inam situated in permanently settled estate and consisting of part of Village—Owner of such inam if landholder within the meaning of S. 3 Cl. (5) of Act—*

Madras Estates Land Act—*Contd.*

Applicability of Act as between him and his tenants.—Post settlement inam grant—Rights of grantee to both warams—Presumption.

The presumption laid down by the Privy Council that a grant to an inamdar is a grant of the proprietary rights in the land granted including the Kudivaram as well as the Melvaram interest applied to a post-settlement inam grant.

The Chief Justice (*Sadasiva Aiyar. J dissenting*):—

It was not the intention of the legislature to apply the provisions of the Madras Estates land Act as between an inamdar and his tenants where the land is situated in a permanently settled estate and consists of any part of a village and the inamdar is the owner of the Kudivaram as well as the melvaram.

An inamdar who holds under a Zamindar subject to the payment of quit rent to him is not a land-holder within the meaning of S. 3 cl. (5) of the Act.

Appala Narasimhulu v. *Sanyasi* I. L. R. 38 M. 33 dissented from.

Sri Gadadharadoss Bavaji v. *Suryanarayana Patnaik.* (*Wallis C. S. and Sadasiva Aiyar J.*) ... 342

Madras Proprietary Estates Village Service Act (II of 1894)—S. 15 cls. 1 and 3—*New Office created under cl.* (1)—*Nomination by proprietor—Validity—Conditions.—Limitation—Starting point of 6 weeks allowed by cl.* (3)—*Delegation of power of nomination—validity—Nomination made by proprietor but report signed by agent—Effect—Nomination in anticipation of creation of office—Validity—Withdrawal of nomination—Permissibility—Effect.*

In the case of the creation of a new office under S. 15 cl. (1) of Madras Act II of 1894, the starting point for the six weeks within which the proprietor has to submit the report referred to in that clause is the day on which all the requisite steps have been completed under S. 6 of the Act, or, in other words, the day on which the last step was completed.

The power of the choice of a new officer given to the proprietor under S. 15 cannot be delegated by him. But where the choice has been made by the proprietor himself, there is nothing to prevent an agent from acting for the proprietor in formally embodying the nomination in the form prescribed for it and signing it for him and submitting it.

A proprietor may submit his nomination in advance in anticipation of a new office being created, such a submission it received and kept on the file and not rejected by the authorities will take effect when the office is created and the time for appointment comes.

Semble the proprietor may withdraw a nomination made prematurely and substitute a new nominee. Such a power to withdraw may exist even with reference to a nomination made after the creation of the office till the nominee is accepted and appointed by the Divisional Officer.

Where a proprietor duly submitted a nomination to a new office as required by S. 15 cl. (1) and subsequently submitted a fresh nomination referring to the prior nomination and confirming it only because he was made to understand that the prior submission was not properly signed

Madras Proprietary Estates Village Service Act—*Contd.* PAGE.
while, in fact, it was, *held* that the first nomination being otherwise valid the subsequent nomination would not, in the circumstances of the case, affect its validity.

Tangutur Narasimham v. *Singaraju Ramiah.* (*Spencer and Krishnan JJ.*) ... 126

Madras Regulation XXV of 1802—Sanad—Grant of—Effect ... 149

Malabar Law. Karamkari and Adimayavana tenures-Incidents. ... 275

——*Karnavan—Melcharth—Grant before expiry of lease—Successor when bound—Necessity—Benefit.*

In the absence of necessity or benefit to the tarwad, a melcharth given by a Karnavan before the expiry of the prior lease will not bind the succeeding Karnavan whether the grantor was or was not alive at the time when the prior lease expired S. A. 774 of 1917 not followed.

Cheria Chirikandan v *Krishnan Nambiar* 27 M. L. J. 690.

Moiden Kutti v. *Kunhi Koyan* 27 M. L. J. 691 followed.

Cheriar Kunhammad v. *Kunhinni Sadasiva Aiyar and Spencer JJ.*) ... 461

——*Tarwad—Kanom—Right of junior members to sue for redemption—Transfer of Property Act, S.* 91 (*a*).

Except in very special circumstances where the karnavan is proved to be guilty of gross misconduct and collusion, it is not competent to the junior members of a tarwad to sue for redemption of a kanom granted by their karnavan.

Vasudevan v. *Sankaran* 20 M. 129 Relied on.

Ottaparakkad Thashath Soopi v. *Charichal Pallikal Mariyamma Spencer and Bakewell JJ.*) ... 207

MINOR—Agent appointed by guardian—Suit for account against—Suit for handing over particular account—Maintainability ... 247

——*Contract by guardian for purchase of land—Enforceability of by minor, on attaining majority—Transfer of Property Act, S.* 55 (1) (*d*).

It is not within the competence of a guardian of a minor to bind the minor or his estate by a contract for the purchase of immoveable property. The minor in such case is not bound by the contract and there is no mutuality. Consequently it is not open to the minor, on attaining majority, to enforce specific performance of the contract. *Mir Sarwarjan* v. *Fakhruddin Mahmed Chaudhuri* 39 C. 232 followed.

Raghavachariar v. *Srinivasa Ragavachariar* 40 M. 308 *Ramlogayya Jagannatham* 42 M. 185 Referred to.

Krishna Iyer v. *Shamanna* 28 M. L. J. 610 not followed.

Narayana Row v. *Venkatasubba Row* (*Spencer and Bakewell JJ.*) ... 77

Mortgage deed—*Execution—Attestation—Registration—Validity— Original valid execution and attestation with regard to one item of property — Subsequent interpolation by mortgagor in the presence of attesting witnesses so as to include second item—Validity of mortgage—Interpolation with assent and to suit convenience of both parties—Effect.*

In a suit on a mortgage deed, executed by the 1st defendant to the third and assigned by the latter to the plaintiff, it appeared that the first item of the plaint property was the only property originally intended to be mortgaged, that the deed was engrossed and signed by the 1st defendant and attested by two witnesses with that intention, that, subsequently

Mortgage deed—*Contd.* PAGE

to serve the convenience of both the parties to the transaction and to avoid delay in registering the deed the 1st defendant made, in the presence of the attesting witnesses, an interprolation in the body of the deed so as to include the second item of property also, and that he subsequently presented the altered deed for registration and had it registered. On objection raised by the 1st defendant that the deed was invalid for want of proper execution proper attestation, and proper registration.

Held, (1) that the deed did not offend against the rule enunciated in *Harendra Lal Roy Choudhuri* v. *Hari Das Debi* 41 Cal. 972 P. C., if it was otherwise valid;

(2) that by the fact of himself inserting the interpolation and presenting the altered document for registration, the 1st defendant must be deemed to have executed the document not only with reference to the 1st item but also with reference to the second item;

(3) that the attesting witnesses must be deemed to have agreed to regard their attestation as applicable not only to the 1st item of property but also to the second item.

Where a party who has no disposing power over a property includes it in a deed for the purpose of getting it registered within a particular jurisdiction.

Semble there would be fraud upon the Registration Law within the language of the Privy Council in *Harendra Lal Roy Choudhuri* v. *Hari Das Debi* ... 251

Kunhi Sankaran Nambiar v. *Ponniath Akathoothu Narain Thirumumpu.* (*Seshagiri Aiyar and Moore JJ.*)

———*Prior and puisne mortgagees — Decree for sale—Extinguishment of mortgage—Position of puisne mortgagee not made a party to the suit—Transfer of Property Act* (*Act IV of* 1882) *Ss.* 85, 89.

An order made under S. 89 of the Transfer of Property Act, 1882 (Act IV of 1882) for the sale of mortgaged property, has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage and the latter rights are extinguished.

When therefore a first mortgagee sued for and obtained a decree for sale without impleading a puisne mortgagee, and subsequently bought in the property, but did not obtain possession for several years.

Held, that the puisne mortgagee could redeem him on payment of the amount due under the decree, and was not liable to pay him the much larger amount to which he would have been entitled under his mortgage if he had not brought the property to sale.

Het Ram v. *Shadi Lal*, 45 I. *A.* 130. followed :—

Umes Chunder Sircar v. *Zahoor Fatima* 21 *A.* 170. distinguished.

Matru Mal v. *Mussammat Durga Kunwar.* (*Sir John Edge.*) P. C. ... 419

———*Purchase by the mortgagee of the equity of redemption in part of the mortgaged property—Value of the property purchased, equal to the amount due on the mortgage—Whether purchase has the effect of discharging the mortgage—Transfer of property Act Ss.* 60 *and* 82.

When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing only that portion of the mortgage

Mortgage deed—*Contd.* PAGE.

debt which was chargeable on the property purchased by him; *i. e.*, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the entire property comprised in the mortgage—even though the value of the property purchased be equal to the amount due on the mortgage.

Sami Row Appa v. *Kuppuswami Aiyangar* (1911) M. W. N. 42 overruled.

Bisheswar v. *Ram Dayal* 22 A. 284. *Nawab Azmit Khan* v. *Jawahir Singh* 13 M. I. A. 404. followed.

Ponnambala Pillai v. *Annamalai Chettiar.* (*Wallis C. J. Oldfield and Seshagiri Aiyar J. J.*) ... 239

Negotiable Instrument—On Demand Promissory note—Contemporaneous agreement postponing date of payment—Admissibility in evidence. ... 70

Onus of Proof—Question as to—Materiality when whole evidence before court. ... 476

Penal Code S. 187—*Offence under—Search under S.* 103 *Criminal Procedure Code—Refusal to assist.*

A person who was called upon by a Salt Inspector to assist in a search held under S. 103 of the Code of Criminal Procedure, refused to do so. He was thereupon charged with an offence under S. 187 I. P. C. and convicted. *Held* that the conviction was right. I. L. R. 26 M. 419.

In re Ramaya Naika distinguished.

Ippili Magatha In re. (*Seshagiri Aiyar and Mr. Justice.*) ... 27

Pleader—*Power to compromise — Unconditional withdrawal of case, if justified.*

A vakalat empowering a pleader to compromise a suit or an appeal, does not authorise him to withdraw it unconditionally. The power to withdraw must be specifically given and cannot be implied from an authority to compromise. *Thenal Ammal* v. *Sakkammal* 41 *M.* 233 *Basangowda* v. *Chanchigiri gowda* 34 B. 408 Referred to.

Ramaswami Pillai v. *Badra Nayakkan.* (*Seshagiri Aiyar J.*) ... 322

Practice—Appeal—Evidence—Admissibility—Question as to—Omission to raise objection to admissibility in courts below—Effect. ... 476

———Counter claim—Right to—Right of person not a defendant costs allowed against him. ... 353

Principal and surety—*Discharge of surety—Conduct of creditor—Hindu Law—Father's personal debt—Liability of sons during life-time of father.*

A surety who has bound himself for a person's doing certain things, is not discharged from his liability unless it is shown that the creditor has, by his conduct, either prevented the things from being done or connived at the omission, or enabled the person to do what he ought not to have done or leave undone what he ought to have done, and that but or such conduct the omission or commission would not have happened.

A creditor suing a Hindu for his personal debt, not tainted by immorality or illegality, is entitled to include the sons of the debtor as parties to the suit and to sell the whole ancestral property including the

Principal and surety—*Contd.* PAGE.

son's share, in execution of the decree. The decision of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* has not altered the previous law in this respect.

Subramina Aiyar v Shaw Wallace & Co. Madras. (*Abdur Rahim and Ayling JJ.*) ... 402

Privy Council—Practice concurrent findings of Fact—Rule as to—Applicability—Adverse Possession—Question as to ... 259

———**Procedure**—*Withdrawal of appeal on terms—Parties not* sui juris—*minors—When consent of Court will be given.*

Applications to allow an appeal to be withdrawn on terms when there are parties concerned who are not *sui juris, e.g.*, minors, should not be granted without grave consideration.

The Courts in India should ordidinarily accept as sufficient the assurance of the minor's counsel that the compromise which is proposed is for his benefit.

In the present case the Board allowed such a compromise in an appeal pending before it on the assurance of the minor's counsel, supported by a certificate of the Counsel, who had appeared for him in the lower Courts.

Sakinabai v. *Shirinibai*, (*Lord Shaw*) ... 481

Provincial Insolvency Act—Ss. 43, 46—*Creditor's application under S. 43—Dismissal—Appeal against order of—Maintainability—"Person aggrieved"—meaning.*

Under S. 43 of the Provincial Insolvency Act, a creditor has no right to set the Court in motion.

Where a creditor, whose application under S. 43 was dismissed, presented an appeal against the order dismissing his application, *held* that he was not "a person aggrieved" within the meaning of S, 46 of the Act, and that his appeal was incompetent.

Iyappa Nainar v. *Manicka Asari*, 40 M. 630. and *Ladu Ram* v. *Mahabir Prasad* 39 A. 71 followed.

Meaning of "person aggrieved" in *Exparte Sidebottam* (1880) 14 ch. D. 458. adopted.

Palaniappa Chetty v. *Subramania Chetty*. (*Seshagiri Aiyer and Moore J.J.*) ... 338

Provincial Small Causes Court (Act IX of 1887) S. 17 *proviso—Requirements of—Whether mandatory or directory—Deposit of decree amount or furnishing the security before the period of limitation is sufficient compliance.*

The provision as to the deposit of the decree amount or the giving of security in the proviso to S., 17 of the Provincial Small Causes Courts Act is sufficiently complied with, if the deposit is made or the security is given before the time prescribed for such application in the Limitation Act has elapsed.

Jeun Muchi v. *Budhiram Muchi* followed.

Per *The Chief Justice and Oldfield, J.* (*Seshagiri Aiyar J dissenting*).

The proviso to S., 17 of the Act is a mandatory provision and not merely a directory rule.

Provincial Small Causes Court Act—*Contd.* PAGE.

Per *Seshagiri Aiyar, J* :—The provisions of S. 17, is only a directory and not a mandatory rule.

The directory nature of similar provisions in the Indian and English enactments discussed.

Assan Mahamed Sahib v. *Rahiman Sahib* (*Wallis, C.J. Oldfield and Seshagiri Aiyar, JJ.*) ... 539

Public Trust—*Permanent lessee from trustee—Right to eject trespasser.*

A permanent lease of trust property in excess of the trustee's powers is not void but only voidable and it is competent to the lessee to sue for the ejectment of a trespasser from the demised land

Venkataramana Ayyangar v. *Kasturiranga Iyengar* 40 M 212 Distinguished *Abhiram Goswami* v. *Shyama Charan Nandi* 36 C 1003 (P.C.) *Palaniappa Chetty* v *Sreemath Deivasikhamani Pandarasannadhi* 40 M. 709 (P. C.) Relied on.

Kadhir Masthan Rowther v. *Segammal.* (*Spencer and Seshagiri Aiyar, JJ.*) 198

Railways Act S. 72—*Indian Contract Act Ss.* 151, 152 *and* 161—*Risk note construction of—"Loss", meaning of—What amounts to "wilful neglect" within the meaning of the risk note—Liability of person employing servants for the latter's acts.*

Railways in India are not common carriers ; and in the absence of a special contract they are liable only as bailees under the Indian Contract Act. *Irravadi Flotilla Co.* v. *Bhugwandas,* 18 Cal. 620 followed.

Where goods are consigned by a Railway under a risk note under contract with the consignor that in consideration of the lower charge he has paid, he would hold the Railway Company "harmless and free from all responsibility for any loss, destruction or deterioration of, or damages to the consignment from any cause whatever, except for the loss of a complete consignment or of one or more complete packages forming part of a consignment due either to the wilful neglect of a Railway administration or to the theft by or to the wilful neglect of its servants, transport agents or carriers employed by them before, during and after transit over the said Railway or other Railways lines working in connection therewith or by any other transport agency or agencies employed by them respectively for the carriage of the whole or any part of the said consignment; provided the term 'wilful neglect, be not held to include fire, robbery from a running train or any other unforeseen event or accident", from the terms "loss" to the goods consigned implies that the goods should have been deprived of the merchantable character in which they were accepted for transmission ; and the consignor can recover damages from the Railway Company only if the goods consigned are entirely deprived of value.

East Indian Railway Co., v. *Nilkanta Roy* 41 *Cal.* 576 *and Bombay Baroda and Central Indian Railway Company* v. *Ambalal Sevaklal* Indian Railway Cases 48, dissented from.

Per *Seshagiri Aiyar, J* :—There would be wilful neglect on the part of a Railway servant if he acted under the supposition that his action might be michievous and with an indifference to his duty to ascertain whether it was mischievous or not.

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Railways Act—*Contd.* PAGE.

Persons who undertake to do certain things and who employs servants to do those things are responsible for the acts of those servants done in the discharge of the duty entrusted to them.

The Madras and Southern Mahratta Railway Co., Ltd. v. *Matti Subba Rao. Oldfield, and Seshagiri Aiyar, J.J.* ... 360

Registration Act—Ss. 17 (3), 23, 26, 35, 40, & 87—Authority to adopt—Registration—Necessity—Execution outside British India by subject of Native State—Presentation for registration after prescribed period—Validity of registration—Presentation by natural father of minor given in adoption—Effect. ... 149

——**Ss. 28 29 and 31**—*Sale—Inclusion of property not intended to be conveyed, for registration in a particular district—Registration if valid—Suit to aside sale—Limitation.*

In a sale-deed intended to convey properties situated within the registration district of M., the parties included a very small item of property which neither the vendor intended to sell nor the purchaser to buy ; and it appeared that this was done in order to effect registration of the sale-deed in another registration district wherein the small item was situate. *Held* that the action of the parties amounted to a fraud on the registration law and the sale-deed was not duly registered so as to affect any of the properties sought to be conveyed.

The sale in question being totally inoperative did not require to be set aside within the period prescribed by art. 44 of the Limitation Act.

Narasimha Rao v. Pappanna. (*Spencer and Krishnan JJ.*) ... 327

——**S. 49**—Unregistered instrument—Admissibility to prove nature of possession held under it. ... 313

Res Judicata—*Ground of defence—Mortgage—Suit for sale under a mortgage—Prior mortgagee made party but prior mortgage not attacked—Whether prior mortgagee is a necessary party in a suit by a puisne mortgagee—Code of Civil Procedure (Act V of 1908) S. 11—Transfer of Property Act (IV of 1882) Ss. 85, 96.*

Section 96 of the Transfer of Property Act expressly provides that when property, the sale of which is directed, is subject to a prior mortgage, it may be sold free of such mortgage with the consent of the prior mortgagee : and implies, that without such consent it cannot be so sold.

A prior mortgagee has a paramount claim, and although made a party in a suit by a puisne mortgagee, need not intervene unless his mortgage is impugned.

Where, therefore, a prior mortgagee was made a party to such a suit but did not appear, and subsequently brought a suit on his mortgage : *Held*, that he was not barred from asserting his claims by S. 11 of the Code of Civil Procedure, inasmuch as there was no deed for him to make his prior mortgage, the validity of which had not been attacked, a ground of defence in the former suit.

Radha Kishun v. *Khurshed Hossein* (*Sir Lawrence Jenkins.*) ... 424

Right of Suit—*Minor—Agent appointed by guardian—Suit by minor for account against agent—Suit for handing over particular account—Maintainbility.—Settlement by arbitrators or mediators—Re-opening of—Grounds.*

Right of suit—*Contd.* PAGE.

An agent appointed by the guardian of a minor is not liable to account to the minor for his acts as an agent. It would be unsafe to extend the rule laid down in *Barnes* v. *Addy*, L. R. 9 Ch. App. 244 and similar cases with respect to trustees *de son tort* to the persons in the position of agents of the guardian of a minor. It is doubtful if the minor can ask the agent appointed by his guardian to hand over any account.

A settlement made by arbitrators or mediators is not liable to be re-opened except on the ground in fraud.

Ramanathan Chettiar v. *Muthiah Chetty.* (*Abdur Rahim and Ayling, J.J.*)... 247

Second Appeal—Burden of Proof—Questions as to—Not material when whole evidence before court in Second appeal. ... 476

————Question of law—Adverse Possession—Question as to. ... 259

Settlement records—*Their value as evidence of title or possession—Settlement of Oudh after the Mutiny—Did the entries then made merely recognise existing rights or constitue a fresh root of title—Inferences from entries in settlement records as to partition or separation of interests—Generally of little value—Presumption against partition.*

Given a joint Hindu family, the presumption is, until the contrary is proved, that the family continues joint. That presumption is peculiarly strong in the case of the sons of one father.

It is not any part of the law of India that settlement records are by themselves conclusive evidence of the facts which they purport to record. They have merely to be considered with the other evidence. The broad question of partition of rights or separation of interests is not dealt with in such record, and the inference of such a transaction from entries therein may be weak or strong according to circumstances. A definition of shares in revenue and village papers is by itself very slight evidence of an actual separation in a Hindu family, and generally quite insufficient to overcome the presumption against partition.

Observations of Edge, *C. J. in Gajendar Singh* v. *Sardar Singh*, 18 All 176 approved.

Lord Canning's Proclamation after the Mutiny swept away all prior titles in Oudh. But the Government officers conducting the settlements did not proceed upon the notion that prior rights were to go for nothing: and in most cases their proceedings were rather a recognition of those rights than a fresh root of title.

Thakur Nageshar Baksh Singh v. *Mussamat Ganesha. Lord Shaw* ... 521

Specific Relief Act, S. 42—*Suit by worshippers for a declaration that alienation of temple properties is invalid—Maintainability of — C. P. Code O.* 1, *R*. 8.

It is competent to the worshippers of a Hindu temple to sue under O. 1 R. 8 of the C. P. Code, for a declaration that a permanent lease of the temple properties in favour of the defendants is invalid and not binding on the trust.

Narasimhacharlu v. *P[illegible]chayya.* (*Abdur Rahim and Ayling, J J.*) ... 226

Stamp Act—S. 2 (5) ; arts. 15 and 40 of Sch. I—*Court Fees Act, Sch. II art.* 6—*Applicability —Receiver appointed by Court — Security bond given by him in favour of Court—Stamp payable on — Bond pledging immoveable properties—Effect.*

Stamp Act—*Contd* PAGE.

Where a Receiver, appointed by a Court and directed by it to furnish security for the proper discharge of his duties as Receiver, executed a security bond in its favour binding himself and his heirs in the sum of Rs. 150 and as security thereof pledging immoveable property worth Rs. 200, *held* that the bond must be stamped both under the Court Fees Act and under Art 40 of Schedule I of the Stamp Act, as it came within the definition of a mortgage in S. 2 (5) of the Stamp Act.

Amirthammal v. *Ramalinga Goundan.* (*Wallis, C. J. Oldfield and Seshagiri Aiyar, J. J.*) ... 503

———(II of 1899)—S. 2 (15) Art. 45 Sch. I (a) art. 5 (c)—*Applicability Partition Instrument—What is—Stamp duty on.*

Where, by a document, termed a yadast or agreement, executed at Trivandrum in Andu 1090 corresponding to the year 1915 by one Krishnaiyar and his brother, and bearing a Travancore adhesive stamp of one anna, the brothers divided their properties situated both in British and Travancore territories, and the deed provided that the partition was to take effect from the date of execution of the document and the properties were to be enjoyed separately with effect from the 1st Thai of Andu 1090 corresponding to 14th January, 1915, and that separate partition deeds should be executed for the properties in Travancore and British India and the document should remain in force till then, *held* that, under the definition in S. 2 (15) of the Indian Stamp Act, 1899, the deed was chargeable as a contract of partition under art. 45.

Rajangam Aiyar v. *Rajangam Aiyar.* (*Wallis, C. J. and Krishnan, J.*) 330

———(*II of* 1899)—*S.* 5:—*Instrument relating to several distinct matters—Sale-deed—Mortgage by vendor of lands not included in sale as security for due performance of covenants—Stamp on deed.*

Where, in a sale-deed the vendor mortgaged lands not included in the sale as security for the due performance of his covenants, *held* that the deed was not an instrument comprising or relating to distinct matters within the meaning of S. 5 of the Stamp Act and was not liable to be stamped both as a sale and as a mortgage. *Govindan Nambudri* v. *Moideen* 41 M. 469. overruled.

Reference under Stamp Act. Secretary to the Commissioner, Salt and Abkari and Separate Revenue Referring Officer. Wallis, C. J., Oldfield and Seshagiri Aiyar. 506

Statute—Interpretation—Proceedings in legislative council Reference to—legitimacy. ... 444

Sureties — *Security for performance of appellate decree — Whether limited to first appellate decree— Liability of sureties how enforced —Whether a separate suit is required — Form of security bond— Enforcement of liability against sureties when no obligee is named—Procedure when the sureties are not personally liable— Code of Civil Procedure,* 1908 (*Act* V *of* 1908,) Ss—47, 144, 145, 151— *Civil Procedure Code* 1882 (*Act XVI of* 1882) *Ss*—546 *Transfer of Property Act,* 1882 (*Act IV of* 1882) *S.* 9

Sections 47 and 144 of the Code of Civil Procedure 1908 provide for the decision of questions relating to the execution, discharge or satisfaction of

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a decree and for restitution, including the payment of mesne profits when a decree has been varied or reversed and they enact that any such question shall be determined in the suit and not by a fresh suit. These sections do not apply to sureties and do not authorise the inclusion of the sureties as parties to proceedings under them. The sureties are however bound by the assessment of damages made in such proceedings as between the parties to the suit.

Semble that the Court to which application is made to enforce an instrument of suretyship if it thinks there has been no real trial of the amount of mesne profits might, upon terms. admit the sureties to question the amount.

The sureties are however, entitled to have their liability upon the instrument determined in a regular manner. When the instrument is in a form making the sureties liable to some named obligee this may be done by means of a regular suit: but such procedure is inapplicable when no obligee is named and where the liability is not personal.

In such a case when the Court is satisfied that the liability exists, it should make an order in the suit upon an application to which the sureties are made parties, that the property charged be sold unless by a named date the sureties find the money.

Raj Raghubar Singh v. *Indra Bahadur Singh.* (*Lord Phillimore*) ... 302

Transfer of Property Act S. 55—*Vendor and purchaser—Execution of registered conveyance—Non-payment of price—Suit by vendee for possession—Form of decree*

Defendant sold immoveable property to plaintiff by a conveyance which was duly registered. The plaintiff did not pay the purchase money but sued for recovery of possession of the property from the vendor. The court below passed a decree for possession conditional on plaintiff's paying the purchase money. Plaintiff appealed. *Held* that the plaintiff was entitled to an unconditional decree for possession of the properties sold to him. *Subrahmania Aiyar* v. *Poovan* 27 M. 28. *Rama Aiyar* v. *Vanamamalai Iyer* 27 I. C. 236. not followed. *Velayudha Chetty* v. *Govindasami Nayakan* 34 543. *Kandasami Pillai* v. *Ramasami Mannadi* 36 M. L. J. 313 Ref.

Krishnamma v. *Kotipalli Mali.* (*Ayling and Coutts Trotter, J.J.*) ... 467

——Ss. 60 and 82—Mortgage—Extinguishment—Mortgagee's purchase of equity of redemption in part of the mortgaged property—Effect— 239

Transferee—Ejectment of—Permanent lessee from trustee of public trust right of ... 198

Undue influence—*Dominating the will of another not sufficient—Use of position to obtain unfair advantage essential—Burden of proving that no domination was practised when it arises—Indian Contract Act,* (*Act IX of* 1872) Ss. 14, 16.

Undue influence is not established by proof of the relationship of the parties having been such that the one naturally relied upon the other for advice, and that the other was in a position to dominate the will of the first in giving it.

To render influence 'undue' it must be established that the person in a position of domination has used that position to obtain unfair advantage

Undue influence—*Contd.* PAGE.

for himself, and so to cause injury to the person relying upon his authority or aid.

It is only when the bargain is with the influencer and is in itself unconscionable that the burden is thrown upon the influencer to establish affirmatively that the other party was scrupulously kept separately advised in the independence of a free agent.

Pooathurai v. Kannappa Chettiar. Lord Show. ...(P.C.)349

Vendor and Purchaser—Registered conveyance—Execution of—Non-payment of price—Suit by Vendee for possession—From of decree ... 467